

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

225

APPELLANTS' BRIEF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,035

DELLA BLACKWELL,

Appellant

v.

REGAL CAB COMPANY, ET AL

Appellees

NO. 17,036

YURRISSAN CARTER,

Appellant

v.

REGAL CAB COMPANY, ET AL

Appellees

NO. 17,037

RAOUL D. CARTER

Appellant

v.

REGAL CAB COMPANY, ET AL

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

SEP 28 1962

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APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

This cause comes on to this Court on appeal from a judgment entered by the United States District Court for the District of Columbia upon a jury finding in favor of the appellees after a trial in the said Court. The said judgment was a Final Order of the said Court and timely notice of appeal was filed. The jurisdiction for this appeal is found in the provisions of Title 28, Section 1291, et seq., of the United States Code, as revised and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The appellants Della Blackwell, Yurrissan Carter, and Raoul D. Carter, brought action against the appellees in the United States District Court for the District of Columbia, seeking to recover damages for injuries sustained in an automobile accident which occurred on April 2, 1956 at the intersection of Minnesota Avenue and Benning Road, N. E. in Washington, D. C. (J.A. p. ____). The appellees filed their answers (J.A. P. ____) and the causes were calendared. Subsequent thereto, and in due course, the cases came on for pre-trial, at which time pre-trial statements were filed by the respective parties (J.A. p. ____), and after hearing, the pre-trial order was entered (J.A. p. ____).

Trial of the cause began on November 13, 1961 in the United States District Court for the District of Columbia before the Honorable Judge Edward A. Tamm and a jury.

The evidence adduced in the course of trial was substantially as follows:

That on April 2, 1956 the appellant, Della Blackwell, together with her two grandchildren, Yurrissan Carter and Raoul D. Carter, were paying passengers in a taxicab operated by appellee Charlie C. Scott. That at or near the intersection of Minnesota Avenue and Benning Road, N. E., the taxicab was struck from the rear by an automobile being driven by the appellee Herbert Lee Brownell, causing the appellants to sustain certain physical injuries.

The appellant Della Blackwell testified that she, together with her sister and the two minor appellants, had entered the appellant Charlie Scott's taxicab at 7th and F Streets, N. W.; that they went first to 131 Thomas Street, N. W. where her sister was discharged, and from there proceeded on to Benning Road, N. E.; that during the course of the ride in the cab she had a conversation with the cab driver during which she inquired of his health and requested that he not rush too much (J.A._____, Tr. p. 37); that they were proceeding East on Benning Road, and when they reached an area called Eastern Branch, they heard sirens and the taxicab driver pulled over and allowed the first fire engine to pass (Tr. p. 37); that as they were about to start, they again heard sirens and the cab driver again stopped to let the second company pass; that these fire engines passed traveling East on Benning Road (Tr. p. 38); that after the second fire company had passed, the cab driver proceeded across the bridge, at which time she continued to hear sirens; that the taxicab in which the appellants were riding was the lead car, not being preceded immediately by any other vehicle; that when the cab arrived at Minnesota Avenue and Benning Road, the driver stopped in obedience to a traffic light (Tr. pp. 40-41); that when the light turned green, the cab driver started to proceed across Minnesota Avenue, and was half way into the intersection (Tr. p. 118), when there was seen an approaching fire truck going North on Minnesota Avenue (Tr. p. 41); that she had been aware of the on-coming fire engine because she not only continually heard the fire sirens, but that the appellant Yurrisan had also said, "Mama, here comes another one", (Tr. p. 45), and she almost simultaneously

saw the approaching emergency vehicle (Tr. pp. 42, 46); that on the date and at the time of the occurrence the weather was warm, and it was a sunshiny day and some of the windows to the taxicab were open (Tr. p. 43). That in her opinion, the fire engine was approximately 30 feet away at the time she observed it; that the fire engine swerved in front of the taxicab, missing it by about 5 feet (Tr. pp. 47-48); that the taxicab driver suddenly applied his brakes (Tr. p. 47), and the appellants were thrown forward to the floor and that they were immediately struck from the rear by the vehicle which was following, and the impact thereof threw them forward again (Tr. pp. 47, 49).

The appellee, Charlie C. Scott, was called as a witness in the appellants's case. He testified substantially: that in crossing the bridge he was leading the traffic (Tr. p. 165); that when he got to Minnesota Avenue and Benning Road, N. E., he stopped and started with the green light; that he had not looked in his mirror and was unaware of the car approaching him from the rear; that the first time he saw the appellee, Brownell's car was after it had struck the rear of his vehicle; that at the time his car was struck, his vehicle had come to a sudden stop; that he had stopped suddenly because of the fire department (Tr. pp. 167-168). He further stated that he could hear the fire department before he saw it come down the street, because there were buildings there which would not permit one to see down the street, and that he had observed the fire department come back; that at the time he

stopped suddenly, he had crossed the crosswalk(Tr. p. 168).1/ The appellee, Charlie C. Scott, also testified that prior to stopping for the light at Benning Road and Minnesota Avenue, N. E., he was travelling 15 miles per hour (Tr. p. 183); that immediately prior to the time his automobile was struck, he had no recollection of having given any signal to the appellee, Brownell, that he was going to stop.

1/ By way of impeachment, the witness was referred to and interrogated about his answers given on the taking of his deposition on December 30, 1959, during which he testified in response to questions relating to the present inquiry as follows: (Tr. pp. 174-175, and page 7 of the appellee's deposition)

Q. Mr. Witness, I will ask you if the following questions were asked of you and if you gave the following answers:

"Question: When you approached the intersection of Benning Road and Minnesota Avenue, Northeast, travelling east on Benning Road, what was the condition of the traffic light for your approach to that intersection?

"Answer: In approaching that intersection, the traffic light was green. I could see it green when I was approaching.

"Question: Well, can you tell me in your own words how the accident occurred?

"Answer: Well, we were approaching the intersection on Benning Road and about before we got to the intersection, the fire department came across. We heard the fire department before I seen it so that gave me plenty of time to stop so I came to a complete Stop."

Q. Now, I will ask you, Mr. Scott, if those questions were asked and if you gave those answers?

A. The questions was asked me and I gave those answers.

Q. Then, it is a fact, is it not, Mr. Scott, that before you got to that intersection, the light was green?

A. Yes, the light was green.

The appellee, Frank E. Brownell, was also called as a witness in the appellants' case. He testified in substance as follows: That on the date and at the time of the accident complained of, he was on Benning Road and Minnesota Avenue, N. E.; that while on Benning Road he did have occasion to hear fire engines, and also observed the vehicles pass him while he was on the bridge on Benning Road; that he was immediately behind the appellee, Charlie C. Scott's vehicle (Tr. pp. 226-227); that he was travelling behind the appellee, Scott's car at a distance of 7 or 8 feet (Tr. pp. 226, 227, 232); and at a speed of about 10 to 12 miles per hour (Tr. pp. 232, 235, 241); that he had maintained the distance of 7 to 8 feet behind the appellee Scott's car as they had proceeded across the bridge (Tr. p. 232); that when he was about 150 feet away from Minnesota Avenue he observed that the light was green, and that he had observed about five or six cars preceding him in the line of vehicles in which he was travelling across Minnesota Avenue (Tr. p. 231); that the appellee, Charlie C. Scott's vehicle stopped suddenly in front of him, at which time he was about seven or eight feet behind; that at about the same time, he had appreciated the presence of the fire apparatus (Tr. pp. 232-234); that the fire vehicle passed in front of the appellee Scott's taxicab after he had struck the said vehicle in the rear (Tr. p. 235).

The appellants introduced medical testimony relative to the nature and character of the injuries sustained by the appellants as a result of the accident.

The appellees, at the conclusion of the appellants' case, moved the Court for a directed verdict for the appellees and urged as their grounds: (1) failure on the part of the appellants to have made out a case on the

basis of negligence, and (2) that the occurrence was an unavoidable accident. The appellants responded to this motion and in their reply stated that the appellees, among other reasons, had not previously indicated that they were relying upon "unavoidable accident" as a defense. Whereupon, over objection, the appellees requested and were granted leave to amend their pleading so as to include "unavoidable accident" (Tr. pp. 345,349).

The appellants moved the trial Court to enter a judgment for the appellants on the issue of liability. The motion was summarily denied.

The appellants subsequently renewed their objection to the submission by the appellees of an order allowing for the amendment of the pretrial order so as to allow for the interposition of the defense of "unavoidable accident." However, the appellees submitted an order allowing for the amendment of the pretrial order so as to include the defense of "unavoidable accident" and "imminent peril", which was granted over objection. (Tr. p. 454). Thereafter, the appellants objected to the appellees' instruction #8 which was submitted to the Court in this regard, and the objection was likewise overruled.

The appellants later in the course of the trial renewed their motion for a directed verdict on the issue of liability, and it was again summarily denied. (Tr. p. 500)

Upon conclusion of the entire case, the Court settled the issues of instructions, among which was the appellees' instruction #8 relating to the "Doctrine of Sudden Emergency" and "Imminent Peril", to which the appellants made objection. The objection was overruled. (Tr. p. 531).

One of the appellees' principal arguments was sudden emergency or unavoidable accident (Tr. pp. 575,576,586). The Court, having instructed the jury, assumed for the record, the renewal of all objections previously expressed by counsel. Thereafter, counsel for the appellants objected to the Court's instruction to the jury relative to the application of the "Sudden Emergency Doctrine," and the objection was noted of record (Tr. p. 622).

The jury rendered a verdict in favor of the appellees. Notice of appeal from the jury verdict was timely filed, and leave to proceed on appeal to this Honorable Court in forma pauperis was granted.

REGULATIONS INVOLVED

District of Columbia Traffic Regulations provide as follows:

Section 22(a). No persons shall drive a vehicle on a street or roadway at a speed greater than is reasonable, and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

Section 33. The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.

Section 39(c). No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

Section 50(a) 1. Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of Section 131.1 of these regulations, or of a police vehicle properly and lawfully making use of an audible signal only:

1. The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

Section 99(c). An operator shall, when operating a vehicle, give his full time and attention to the operation of the same

SUMMARY OF ARGUMENT

I

The District Court erred in denying appellants' request for a directed verdict on the question of the appellees' negligence or liability. This denial was prejudicial error.

The evidence at trial demonstrated that both appellees, Scott and Brownell, heard sirens as they approached the intersection, that the appellee, Scott, in spite of this, continued into the intersection where he had to make a sudden stop to avoid collision and that appellee, Brownell, could not avoid striking appellee Scott's car because of the speed of appellee Brownell's car and its closeness to appellee Scott's car.

Appellants contend that reasonable men cannot differ on the factual issue that this evidence demonstrates negligence by both appellees and that therefore the verdict should have been directed for the appellants by the trial court.

II

The purpose of pretrial conference is to raise all issues upon which the parties intend to rely at trial, so that the court and the parties may be prepared on these issues. The appellants contend that the intended purposes and ends of pretrial proceedings would be nullified or thwarted if parties are to be allowed to raise substantial legal issues at will during the trial, which issues have not been justified by the introduction of new evidence not reasonably within the contemplation of the parties at pretrial. In light of this consideration, the trial court erred in allowing the appellees to amend their pleadings at the close of the appellant's evidence so as to include the "Sudden Emergency Doctrine" as a defense.

III

The trial court having erred in not having directed the verdict against both appellees on the issue of liability or of negligence necessarily also erred in allowing the defense of sudden emergency for the appellees; particularly when the appellees had not previously urged such defense.

IV

Appellants contend that the "Sudden Emergency Doctrine" is inapplicable in this case for another reason:

The "Sudden Emergency Doctrine" states that a party caught in a perilous situation cannot be held accountable for conduct in that situation which on calmer more deliberate thought would be found to be not the best course of action. It is enough, according to the doctrine, that the choice of action adhered to was the same that a reasonably prudent man in the same circumstances would adhere to.

Conceding agendo that appellee Scott adhered to the best course of action possible, and further that the appellee Brownell had no choice of action at all, and that calmer deliberation could not have found any other or better choice the appellees could have adhered to in the situation they were in, nonetheless, the "Sudden Emergency Doctrine" does not apply.

V

Appellants urge that the lower court committed prejudicial error in instructing the jury, over objection, that the jury should first determine whether the appellees were negligent and then determine whether the "Sudden Emergency Doctrine" applied. The perilous situation referred to in the "Sudden Emergency Doctrine" is another factor in the circumstances which the jury must consider in determining whether the appellees were negligent. Therefore, the consideration by the jury of appellees' negligence and the application of the "Sudden Emergency Doctrine" must be simultaneous.

ARGUMENT I

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR A DIRECTED VERDICT

The appellants urge that the factual circumstances of the occurrence giving rise to the injuries sustained by the appellants lend to the unalterable conclusion that the appellees were jointly negligent. It is difficult to conceive, in light of the physical facts in the case at bar, how reasonable men could possibly conclude otherwise.

The foregoing contention is predicated upon five principal factors:

(1) Both of the appellees admitted having heard sirens and having seen fire vehicles immediately prior to the accident; (2) Both of the appellees were travelling at a rate of speed between 12 and 15 miles per hour with a distance between them of only 7 or 8 feet; (3) The appellee, Charlie C. Scott, suddenly stopped his vehicle without warning; (4) That the appellee, Brownell, was travelling too fast under the circumstances, and was following the appellee, Charlie Scott's taxicab so closely, that it was physically impossible for him to have stopped his vehicle without having struck the appellee, Scott's vehicle; (5) That the admissions of the appellees demonstrate that they knew or should have known of the possibility or probability of the presence of other and further emergency vehicles, and should, therefore, have been proceeding with more care and caution; and (6) The appellants were passengers for hire in the appellee, Charlie C. Scott's taxicab. ^{1/}

^{1/} The above conclusions with respect to relevant factors are contained, in the opinion of counsel for appellants, in the testimony given by the appellees, Charlie C. Scott and Frank Brownell.

The rule has been stated that where the evidence upon any issue is all on one side, or so overwhelming on one side as to leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury: See: *Gunning v. Cooley*, 74 L ed. 720 affirming 30 Fed 467 58 App. D.C. 304, Cert. granted 49 S. Ct. 263, 279 U.S. 828 73 L. Ed. 972; *Chesapeake B.R. Co. v. Freg*, 39 App. D.C. 58,59; *Catholic University v. Waggaman*, 32 App. D.C. 307, 320, and *Capitol Transit Co. v. Bingman*, 212 F 2nd 241, 94 U.S. App. D.C. 75.

The appellants contend that there was but one reasonable conclusion which reasonable men could have reached as to appellee, Charlie C. Scott, and the appellee, Frank Brownell, and that was that they were both negligent. Since then there was but one conclusion, and in accordance with the rule of law hereinbefore stated, the trial court erred as a matter of law in not having directed a verdict for the appellants on the issue of the appellees' joint negligence. The failure to have done so constituted prejudicial error of such character as compels reversal by this Honorable Court.

ARGUMENT II

THE TRIAL COURT ERRED IN HAVING ALLOWED THE APPELLEES TO AMEND THEIR PLEADINGS AT THE CLOSE OF THE APPELLANTS' CASE SO AS TO INCLUDE THE DEFENSE OF SUDDEN EMERGENCY

Counsel for the appellees at the conclusion of the cases for the appellants, moved for leave to amend their pleadings so as to include the defense of unavoidable accident or sudden emergency (JA_____, Tr. pp. 345,349). The appellants made due and timely objection thereto on the ground that the appellees' request was unseasonable, and also, that there was no view of the facts which would allow for and justify such defense. The objection was overruled. Thereafter, the Court entered an order allowing the appellees to amend their pleadings, thereby permitting the defense of sudden emergency, imminent peril or unavoidable accident. (JA_____, Tr. p. 454).

The appellees, at the end of the entire case, further buttressed their unwarranted application for leave to amend by requesting through their submitted prayer #8, that the court instructed the jury with respect to sudden emergency or unavoidable accident. (JA. ____, Tr. pp 531, 534).

The record does not disclose that the appellees were unexpectedly made aware of any new evidence during trial which related to the issue of sudden emergency, which they could not have reasonably foreseen at the time of pretrial. In the opinion of counsel for the appellants, the appellees did not satisfactorily justify the granting of leave to amend their pleadings.

In the case of Meadow Gold Products Co. v. Wright, 278 F 2nd

867, (1960), this Court said:

"The casual pleading indulged by the courts under the Federal Rules of Civil Procedure has quite naturally led to more and more emphasis on pretrial hearings and statements to define the issues. To give full effect to the modernized rules, one of the theories of a case is not to remain a mystery or a matter of speculation and conjecture. It was to get away from legal sparing and fencing, and from surprise moves of litigants, that the new rules were adopted. Citing Walker v. West Coast Fast Freight, Inc., 9 Ar., 1956, 233 F 2nd 939. The refinement of these basic objectives is manifested in the increasing emphasis on the pretrial processes.

The Federal Rules encourage litigants to plead only a simple statement, in sequence, of the events which have transpired, coupled with a direct claim by way of demand for judgment, Gins v. Mouser Plumbing Supply Co., 2 Cir., 1941, 148 F 2nd 974. Thus the pretrial procedure, when utilized, becomes the principle means of defining the issues in a case and the legal theories upon which they are to be tried. In the recent case of Rosden v. Lenthold, 107 U.S. App. D.C. 89, 274 F 2nd 747, 750, we had occasion to point out that the primary purpose of the pretrial procedure is to 'define the claims and defenses of the parties for the purpose of eliminating unnecessary proof and issues, lessening the opportunities for surprise and thereby expediting the trial.' (emphasis supplied by the Court).

To this end, Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A., provides that the court, in its discretion, may direct the parties to attend a pretrial conference to consider inter alia, the necessity and desirability of simplifying the issues or amending the pleadings. The action taken at this conference is recited in a court order, 'and such order when entered controls the subsequent course of the action...' In this jurisdiction, a full time Pretrial Commissioner, an Assistant Pretrial Commissioner and a staff have been set up.

In view of all these developments, the courts are not to be lenient with counsel who fails to re-

veal the theory of their case until all the evidence is closed."

In the case of Johnson v. Geffen, 294 F 2nd 147 (1960) the majority of the Court said:

"We fully recognize the force of the view of our dissenting Mr. Justice Reed, and we agree with his basic position that counsel for the plaintiff cannot fail to reveal the theory of his case and he must state the issues he poses for trial with sufficient certainty and clarity to apprise the trial court and the opposing defendant of what they may expect in the course of the trial."

Appellants realize that the Court has two interest to balance in a determination of this type. The interest in having orderly and speedy trials must be balanced against the interest of eliminating excessive journalism and rigidity in pleading. However, appellants argues that this is a case in which the circumstances warrant the laying down of a limit to the above mentioned balance.

In this case, appellees were not apprised of any new evidence which they could not have foreseen at pretrial. Moreover, here counsel for the appellants made timely objection to the amendment of the pleadings which was not done by counsel in the case of Meadow Gold Products Co. v. Wright, cited supra..

Accordingly, appellants urge upon this Honorable Court that the amendment of the appellees' pleadings should not have been permitted, particularly in light of the appellants' timely objection. Here, the sudden emergency defense was not inserted into the litigation at

pretrial, and there was no evidence relating to the perilous situation introduced at trial which the appellees could not have reasonably foreseen at the time of pretrial. There was no tenable excuse or compelling extenuating circumstances.

By contrast, an interesting observation is to be noted in the attitude assumed by the court in the instance where counsel for the appellants indicated a desire to call as a witness one Dr. Barber, a neurosurgeon, who had examined the appellant, Della Blackwell, but whose name had not been previously furnished to counsel for the appellees as one of the witnesses to be called on behalf of the appellants. The appellees objected (JA.____, Tr. p. 14), and the Court, in sustaining the objection, stated:

"I think the Court, Mr. Shorter, must enforce the pretrial order. If we are not going to do that, we shouldn't have pretrials. I do not think I have any option in a situation of this kind but to say the pretrial order will govern the case." (J.A. _____, Tr. p. 17)

Appellants urge that in the absence of a showing of justifiable cause and undue prejudice, the arbitrary insertion of new legal defenses which were reasonably foreseeable, should not be permitted or indulged.

The appellants say the trial court erred, and that the error was substantial and prejudicial.

ARGUMENT III

THE "SUDDEN EMERGENCY DOCTRINE DOES
NOT APPLY WHERE THE PARTY SEEKING ITS
USE HAS THROUGH HIS OWN NEGLIGENCE
PRECIPITATED OR CONTRIBUTED TO THE
PERILOUS SITUATION WHICH GAVE RISE
TO THE ACCIDENT OCCASIONED THEREBY.

The emergency which the instruction¹/ proposed to cover related to the circumstances of the situation which was presented at the time the appellee Charlie C. Scott suddenly applied his brakes without warning at the intersection of Minnesota Avenue and Benning Road, N. E., and the circumstance of the appellee Frank Lee Brownell travelling 7 to 8 feet behind the appellee Scott at a speed of from 10 to 15 miles per hour and the subsequent collision. Therefore, the determination of the applicability of the instruction must be made in light of the appellees' conduct in direct relation to the so-called emergency situation. In the case at bar, it may readily be seen that even the appellees' view of the occurrence establishes initial negligence on the part of both and clearly demonstrates activity by each of the appellees of the character that would substantially contribute to the creation of the emergency situation.

The "Sudden Emergency Doctrine" carries with it the prerequisite condition that the one seeking to invoke it has not committed acts of negligence which either create or contribute to the emergency, Prosser on Torts, 1941 Ed. pp. 242, 243.

¹/ Appellee Frank Lee Brownell's instruction #8.

The appellants contend that the "Sudden Emergency Doctrine" applies only in the instance where there is no negligence on the part of the party seeking to invoke the doctrine that gave rise to the existence of the emergency and where the said party, because of the suddenness and unexpectedness of the emergency, was deprived of the opportunity to deliberate. Consequently, the rule of diminished responsibility is not available when the party, who seeks to invoke it, is not free from contributory fault..

Here, the obvious negligent conduct of the appellees was part and parcel of the alleged emergency and the application of the rule of diminished responsibility in this instance, would constitute a bonus for the appellees' misconduct.

In the case of Wiebel v. Ferguson, 19 A 2nd 357, 360, the Court stated as follows:

"Defendant was conscious of weather conditions, the curve in the road and the wet or slippery surface; there is no evidence of any emergency not created by his own conduct which would diminish the degree of care ordinarily exercisable by him. Compare Simrell v. Eschenbach, 303 Pa. 156, 161, 154 Atl. 369..."

See Also, Shell Oil Co. v. Slade, 133 F. 2nd 518 and Gajewski v. Lightner, 19 A. 2nd 355, 357.

This Court settled the legal proposition here involved in the case of Gatton v. Cullen, 1943, 78 U.S. App. D. C. 170, 138 F. 2nd 425, which has been consistently followed. In the case of the District of Columbia v. Tilghman, 157 A. 2nd 629, quoting the case of Gatton v.

Cullens, supra, the Municipal Court of Appeals stated the law of the District of Columbia to be:

"Finally concerning the 'Emergency Rule', it is the law that if the driver of an automobile is suddenly confronted with an emergency not of his own making, (emphasis added) and is compelled to act instantly, he is not guilty of negligence if he makes a choice such as a person of ordinary prudence would make in a similar situation, even though it afterwards develops he might have made a wiser choice."

The Court in District of Columbia v. Tilghman, 157 A. 2nd 629 also stated:

"Due care in an emergency will not insulate an actor from liability for consequences of the negligence that helped to bring the emergency about."

It is clear then that the law is that a person whose negligence has precipitated the perilous situation, may not invoke the "Emergency Rule". Surely it would be unjust if a person creates a perilous situation to allow him to claim the defense of the "Emergency Rule".

If this Court then finds that the lower court erred in not directing the verdict on appellees' negligence, then this Court should also rule that because of appellees' negligence, appellees may not invoke the "Emergency Rule".

The appellants contend that the error committed by the trial court was substantial.

ARGUMENT IV

THE SUDDEN EMERGENCY RULE DOES NOT APPLY
WHERE THE PARTY INVOKING THE RULE ACTED
IN THE ONLY WAY POSSIBLE UNDER THE CIR-
CUMSTANCES.

The rule laid down in *Gatton v. Collins*, supra, and in *District of Columbia v. Tilghman*, supra, that the driver of an automobile is not guilty of negligence if he makes a choice such as a person of ordinary prudence would make in a similar situation, even though it latter develops that he might have made a wiser choice, supports and lends further reason why the sudden emergency rule does not apply in this case.

The emergency rule implies that the party invoking it must have been confronted with a choice of acts which could be pursued in the perilous situation. It applies when this choice existed and the act chosen during the peril upon calmer, more deliberate consideration, proves not to have been the wisest choice. The rule then further provides that if the act chosen and adhered to was that which a reasonably prudent man acting in the same perilous situation would have adhered to, the party so acting is excused from negligence.

The appellants concede that the appellee, Scott, did the most prudent thing in the perilous circumstances he faced. Indeed, his stopping to avoid collision was the only thing he could do after having negligently entered the intersection. However, his conduct immediately prior to his having entered the intersection certainly, upon calm deliberation, would appear not to have been the safest or reasonably prudent thing to have done.

Therefore, since it is admitted that there was no wiser choice available to appellee Scott after having entered the intersection, and since after entering the intersection, he did not perform an act of which subsequent calmer deliberation could disapprove, the emergency rule may not, therefore, be invoked by the appellee, Scott.

Similarly, appellee Brownell had no choice in his moment of peril. In fact, at his speed and proximity to appellee Scott's taxicab, his momentum necessarily carried him inevitably into collision, and he exercised no faculty of choice at all unless it was to, almost as a reflex, place his foot on his brake. Appellee Brownell's action on calmer deliberation could not have been otherwise because physical circumstances and necessity gave him no choice.

The appellants urge upon this Honorable Court that as a matter of law neither of the appellees are entitled to the benefit of the "Sudden Emergency Doctrine." Appellants say that the error was substantial and prejudicial, and therefore, compels reversal.

ARGUMENT V

THE TRIAL COURT ERRED IN INSTRUCTING
THE JURY TO APPLY THE "SUDDEN EMER-
GENCY RULE" ONLY AFTER A FINDING OF
NEGLIGENCE.

In the view of the appellants, the trial court's charge to the jury substantially outlined two steps to be followed: (1) The jury was to determine whether the appellees were negligent; (2) If the jury found that the appellees were not negligent, then their verdict should be for the appellees, but if the jury found that the appellees were

negligent, then the jury was to determine whether the application of the "Sudden Emergency Doctrine" excused the appellees from their negligence.

The law is legion for the proposition that unless the actor is a child or an insane person, the standard of conduct to which that individual must conform to avoid being negligent is that of a reasonable man under like circumstances. The appellants assert that the foregoing accepted principle of law, as well as that relating to the application of the "Sudden Emergency Doctrine" compel that in either instance a jury must make one and the same determination; that is, whether the actor conducted himself as a reasonably prudent man would in similar circumstances.

The Court in Freehauf Trailer Co. v. Gusewelle, 190 F. 2d 248 (1951) Cert denied 72 S. Ct. 105, 342 U.S. 866, 96 L. Ed. 651, said:

"The 'Sudden Emergency Rule' is not an exception to the general rule that one must act at all times as a reasonably prudent man would act under the same circumstances. An emergency is merely one of the circumstances to be considered by the jury in determining if the party's course of action was one that an ordinarily prudent man would have followed."

It is clear then that negligence and the "Sudden Emergency Rule" are inextricably intertwined and the jury should be instructed to consider both at the same time since both involve what a reasonably prudent man would or would not do in a given set of circumstances. The "Sudden Emergency Rule" merely provides that the peril is one more fact which the jury must consider in determining negligence,

and further provides that the jury should regard the fact of the peril in determining negligence in a special way; that is, the jury should not consider what a reasonably prudent man would do under calmer more deliberate thought, but rather the jury should gauge the actor's performance by what a reasonably prudent man would do in the same peril with the same amount of time to act.

Viewed in the foregoing light, the "Sudden Emergency Rule" appears to be little more than a special caution to the jury to view the acts of the party truly as a reasonably prudent man facing the same peril and not as philosophers who may view the act with detachment and hindsight after the peril is over.

Appellants say it was prejudicial error for the trial court to instruct the jury to consider negligence and the "Sudden Emergency Rule" separately. It was prejudicial error because the jury was led into confusion in their application of these two related concepts by reason of the instructions given by the trial court.

Under the charge, the jury might conceivably first have found the appellees negligent and then applied the "Sudden Emergency Rule" to exonerate them of their negligence. This is an obvious contradiction, because the jury then would first have determined that the defendants did not act as reasonably prudent men in the circumstances and second, have determined that the defendants had acted as reasonably prudent men in the circumstances.

Accordingly, appellants urge as a matter of law that in instructing the jury on negligence and the "Sudden Emergency Rule", the trial courts

should make clear to the jury that both concepts relate to one and only one determination; that is, whether the defendants (appellees here) acted as reasonably prudent men would have in the same circumstances, the circumstances being understood to contain the peril.

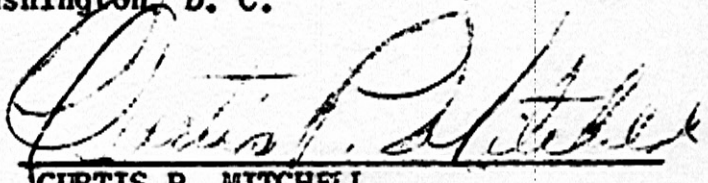
The appellants contend that the error was circumstantial and prejudicial and compels reversal.

CONCLUSION

In conclusion, appellants submit to this Honorable Court that the court below committed substantial prejudicial and reversible error as to each of the points hereinbefore set forth in the appellants' brief and therefore counsel respectfully urge that this Honorable Court reverse the judgment entered in the court below.

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ATTORNEYS FOR APPELLANTS
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BY:


CURTIS P. MITCHELL

BRIEF FOR APPELLEES,
FRANK E. BROWNELL and MILDRED BROWNELL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,035

DELLA BLACKWELL,

v.

Appellant,

REGAL CAB COMPANY, ET AL.,

Appellees.

No. 17,036

YURRISSAN CARTER,

v.

Appellant,

REGAL CAB COMPANY, ET AL.,

Appellees.

No. 17,037

RAOUL D. CARTER,

v.

Appellant,

REGAL CAB COMPANY, ET AL.,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
United States Court of Appeals FOR THE DISTRICT OF COLUMBIA
for the District of Columbia Circuit

DEC 21 1962

Joseph W. Stewart

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(i)

QUESTIONS PRESENTED

Appellees Brownell contend the following are the questions presented .

I

Whether the trial court was in error in allowing appellees to amend pleadings to conform to the evidence.

II

Whether evidence in the case supported the interposing of the defense of "sudden emergency".

III

Whether appellees through their negligence created or contributed to the situation giving rise to the collision.

IV

Whether the trial court was correct in not granting appellant's motion for a directed verdict.

V

Whether court properly instructed the jury on the "sudden emergency" doctrine.

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United States Court of Appeals

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES,
FRANK E. BROWNELL and MILDRED BROWNELL

SUMMARY OF ARGUMENT

1. The trial court properly allowed appellees to amend their pleadings to include the defense of imminent peril or sudden emergency.

Rule 15 of the Federal Rules allows amendments to be made, at the discretion of the trial court, if the evidence supports the amendment. The appellants were asked if they wished time to meet this additional defense and they refused that offer. Having made their choice they cannot now be heard to complain.

2. The evidence supports the defense of sudden emergency. The testimony of appellees makes it clear that but for the sudden unannounced approach of the fire engine, which was hidden from view by a nearby building, this accident would not have occurred. The appellees were approaching and attempting to cross the intersection on a favorable traffic light following in a line of traffic. If the fire engine had used its siren sooner the collision would not have occurred.

3. The appellees were not negligent in causing the emergency to arise. They had no control over the fire engine. The emergency was the fire engine going into the intersection against the red light without adequately warning the vehicles already in the intersection of its approach.

4. Appellants' motion for a directed verdict was properly denied. The evidence was not so one-sided as to say that a directed verdict should be granted. There was a conflict of testimony upon which reasonable men could differ. That being so the question of negligence or lack thereof was a jury question and not a question of law for the court to decide.

5. The trial court's instructions on sudden emergency was a proper statement of law. Parts of a court's instructions cannot be picked out and criticized if the whole instruction properly states the law. When the court concluded instructing the jury, although objection was made to the giving of an instruction on the sudden emergency doctrine, there was no objection made by appellants that the instruction given on this doctrine was incorrect. That being so appellants are prohibited from raising that point on appeal.

ARGUMENT

I. The Trial Court Has the Right To Allow Pleadings To Be Amended To Conform to the Evidence

Rule 15b of the Federal Rules of Civil Procedure allows pleadings to be amended during the course of trial. The Rule says in part.

"If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the case will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence."

In line with that is the case of Meadow Gold Products Company v. Wright, 108 U.S. App. D.C. 33, 278 F. 2d 867. This case has been quoted in part by appellants in their brief. We believe the pertinent part of the decision was left out by them. In fact the part quoted by appellants is more in the nature of dicta rather than the decision in that specific case. The opinion states:

"The sole question is whether the trial court erred in instructing the jury on the doctrine of last clear chance. When this issue was not specifically framed by the pleadings or the pre-trial order and, in fact, not until the evidence was completed and argument on instructions was being had * * * *

* * * * When it was raised both the trial judge and appellants' counsel expressed their surprise, and appellants' able counsel was confronted with a dilemma. He could have asked for a mistrial, or at least a continuance and reopening, and, had he done so, the question for our determination would have been whether or not a ground for reversal had resulted, assuming the motion would have been denied. However, after consideration, counsel finally elected to make neither motion. Nor did he enter formal objection to the requested instruction on last clear chance. In view of this circumstance we are not called upon to decide whether this doctrine should have been allowed to go to the jury. * * * *"

"No criticism can attach to counsel for the choice he made but, while it is unfortunate that he was confronted with the problem, having made a choice he is nevertheless bound by it."

Similarly upholding the trial court's right to allow amendments to pleadings at trial is the case of Pennsylvania Greyhound Lines v. McKenzie, 237 F. 2d 204. The court said:

"Reversal is sought on the ground that, since the pre-trial order did not include the issue whether the accident caused or aggravated appellee's rare systemic disease of scleroderma, the trial court erred in permitting appellee to raise it. The record clearly shows, however, that appellants' counsel was aware that appellee was afflicted with the disease; that he professed some knowledge of its medical aspects; and that he did not ask for a continuance." (Emphasis added) "In light of these circumstances appellant may not claim prejudice by surprise. Since there is no error affecting substantial rights, the judgment is affirmed."

A citation is given in the Pennsylvania Greyhound case to the prior case of Rabenovets v. Crossland, 78 U.S. App. D.C. 54, 137 F. 2d 675, wherein the court said:

"The chief contention of appellant Rabenovets is that appellee should not have been permitted, under a complaint which charged a permanently shortened leg, to prove a pelvic tilt and spinal curvature. We need not decide whether the complaint gave adequate notice of the nature of the injuries. If it did not, appellant would have been entitled to a continuance, and we must assume that he would have obtained one on request. Federal Rules of Civil Procedure, Rule 15b, 28 U.S.C.A. following Section 723c. He objected to the testimony but he did not ask for a continuance. In these circumstances we are satisfied that there was no prejudicial error in admitting the testimony."

It seems clear from these decisions that it was within the trial judge's sound discretion to determine whether the appellees' requested amendment of the pleadings should have been allowed. In this case the

trial judge decided that the amendment should be allowed: Unless there was an abuse of discretion which is not evident here the decision of the trial judge in that respect is not subject to appellate review.

There can and should be no doubt from the wording of Federal Rule 15b and the cases decided thereon that the right existed for the Court to allow the amendment to be made.

In the instant case when the request was made by counsel for appellees to amend the pleading to include the additional defense of "sudden emergency" the appellants' attorneys did not claim surprise although they did object to interposing the defense at that time. Appellants' counsel were then asked by the Court if they required any additional time for the preparation of their case to meet the new matter brought in by the amended pleading to which they replied "No". (J.A. 60). The appellants had the right at that time to ask for, and would undoubtedly have been given, a continuance of the case but they elected not to do so. It would seem therefore that having decided to go forward they should not complain at this time.

II. The Amendment Was Properly Allowed by the Court Under the Facts as Produced by the Evidence

The next question to be discussed is whether the facts justified the inclusion of the defense of sudden emergency as an additional pleading in the case. Appellees believe they had a right to rely on that defense in addition to the other defenses presented.

The testimony adduced certainly raised the question of an emergency situation confronting the defendants and we believe that the evidence certainly was sufficient to support such an instruction.

The majority of the testimony given by appellee Scott and appellee Frank E. Brownell came as the result of the plaintiffs calling them to testify as adverse parties. Appellee Scott was first called by the

appellants and he testified (J.A. 50) that as he entered the intersection, traveling east on Benning Road, on a green light, he heard without previous warning the near approach of a fire engine. Accordingly he stopped suddenly to avoid a collision with that vehicle (J.A. 50). Appellants' attorney summarized Scott's testimony when he asked Scott this question (J.A. 52):

"Q. Then, at the time, sir, that you made this sudden stop in appreciation of this oncoming fire engine, was your foot on your brakes?

"A. Yes, my foot was on my brakes.

"Q. Now then how soon after that when you made that sudden stop was it that you were struck from the rear by the automobile which was operated by Mr. Brownell?

"A. It was a few seconds; it was a few seconds after that before I was struck."

Scott further said he did not give Brownell a signal that he was going to stop (J.A. 51).

The appellee Frank E. Brownell was also called as an adverse witness by the plaintiff and he testified (J.A. 53) that he heard and saw fire engines which passed alongside him traveling east on Benning Road sometime before the accident occurred. Later a lone fire engine came north on Minnesota Avenue. The following questions were asked by the appellants' counsel (J.A. 54):

"Q. Now did there come a time that you saw an emergency or fire vehicle on Minnesota Avenue?

"A. About the time of the accident.

"Q. Well, when you say 'about the time' had you heard or seen the fire engine prior to the time that you struck this vehicle which preceded you?

"A. No.

"Q. Now, this car that stopped in front of you, sir, at the time this car stopped suddenly in front, what was the condition of the light controlling traffic going east on Benning Road across the intersection of Minnesota Avenue?

"A. Green."

Appellee Frank E. Brownell further testified (J.A. 55) that there were seven or eight cars stopped ahead of the taxi cab in front of him in obedience to a traffic light at the intersection of Benning Road and Minnesota Avenue. The several fire engines that had previously passed him on Benning Road had left the scene and they could not be heard in the distance. Later the traffic light turned to green and the seven or eight cars in front of the taxi went on through the intersection traveling east on Benning Road. He also said that the siren of the lone northbound fire engine did not sound until just about a second before the collision occurred. This witness further testified (J.A. 56) when he saw the engine after the siren sounded it was about 20 feet from the intersection, not being visible to him when the engine was a point further south on Benning Road because of a building on the corner which obstructed the view. He further said that if the taxi cab in which the appellants were riding had not stopped there would have been a collision between the taxi cab and the northbound fire engine.

The testimony of both of the appellees certainly paints a vivid picture of the creation of an emergency traffic condition caused by the sudden unannounced presence of the northbound fire engine. Obviously the failure of the fire engine to announce its approach to the intersection when it was faced with a red light and the obstruction by the building of the view of the approaching fire engine were both conditions over which neither of the appellees had any control. Both of the appellees were proceeding in a line of traffic into the intersection being governed by a green traffic light. There was, until the siren sounded, no prohibition for their proceeding into and across the intersection.

The record of testimony does not preclude the possibility that any of the appellees had only one choice of action to avoid the accident. Both the drivers said they applied their brakes to avoid the accident and, in fact, Mrs. Brownell also stated that appellee Scott applied his brakes in an effort to avoid colliding with the northbound fire engine. There was no inquiry made in examining these witnesses to determine if other

measures were available to either or both of the drivers. From the evidence it cannot be said that the only action either driver could have taken was to apply the brakes. The evidence certainly does not eliminate the possibility that both or either of them could have avoided the accident by turning to the right or to the left. It cannot be conclusively presumed that each of them had but one course of action available to them.

There was in other words ample evidence on which to base the defense of sudden emergency and therefore sufficient grounds to warrant the court in allowing the inclusion of that defense in appellees' case.

III. The Appellees Did Not Create, or Contribute to, the Situation Giving Rise to the Happening of the Accident

The automobiles of the appellees were in a line of traffic that had stopped for a traffic light. When the light changed to green all cars started forward. If the fire engine had not come to the scene no accident would have occurred. If the siren had been sounded before it was sounded both of the drivers would have been alerted in sufficient time so that neither Scott nor Brownell would have been required to make a sudden stop. In our opinion the sole proximate cause of the accident was the negligence of the fire engine driver not sounding his siren a sufficient distance from the intersection in time to warn traffic crossing in front of it of its approach and of its intention to proceed through the intersection against the red traffic light facing it.

IV. No Error Was Committed by the Court in Not Granting Appellant's Motion for a Directed Verdict

Appellants adopt the premise that appellees were both negligent as a matter of law. Appellees say they were not and that it was a matter of fact which only the jury could decide.

Of course the question to be decided by the court when it was asked to grant a motion for directed verdict is whether there was sufficient

evidence to warrant sending the issue of negligence to the jury. In order for such a motion to be granted it must be a factual situation where all reasonable men can draw but one inference from the facts. It is only then that it becomes a question of law. The case of Chesapeake Beach R. Co. v. Brez, 39 App. D.C. 58, 59, holds for the proposition:

"The provinces of the court and jury in the Federal judiciary system are separate and distinct, and the line of division between them must be carefully observed. The ascertainment of this boundary is often a matter of difficulty in a particular case, and when the difficulty arises doubts should be resolved in favor of trial by jury, it is the constitutional right of every suitor in the courts of common law. * * * And the court is never justified in directing a verdict, except in cases where, conceding the credibility of the witnesses, and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon."

As far back as 1930 the U. S. Supreme Court said in the case of Gunning v. Cooley, 281 U.S. 90, 94, that:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. Texas & Pacific Railway Co. v. Cox, 145 U.S. 593, 606. Gardner v. Michigan Central Railroad, 150 U.S. 349, 360. Baltimore and Ohio Railroad Co. v. Groeger, 266 U.S. 521, 524, 527.

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Richmond & Danville Railroad v. Powers, 149 U.S. 43, 45."

It is appellee's contention that there was more than sufficient evidence in the instant case to warrant the jury passing on the question of negligence. It was not a question of law for the court to decide.

In addition to the above, one of appellants' requested instructions and one of appellee Brownell's requested instructions had to do with the duties owed by a lead vehicle and the duties owed by a following vehicle. The court in examining the two instructions found that they were not incompatible and granted both of them. No one made objection to this ruling on those instructions either then or at any later time. The court's instruction on this point is set forth on page J.A. 75. By presenting this instruction the appellants accepted the proposition that the speed of the vehicles, their distance apart, adequate warning, etc., were all questions of fact for the jury to decide. Appellants now take the view that those were not jury questions. Because they did not make objection to the court's ruling on these instructions at the time of trial they cannot raise that point at this time. This we believe is decisive of this issue.

**V. There Was No Error in the Court's Instructions
In Applying the Sudden Emergency Rule**

It appears to the appellees that there is no merit to this argument of the appellant.

At the outset we should say that it is difficult for us to understand the point attempted to be raised by appellant and perhaps the reason is that we do not read the court's instructions in the same way appellants apparently read them.

It is obvious that the court's instructions are to be considered as a whole. It is not proper to point to one part of the instructions to the exclusion of the other parts. It is difficult to understand how the court could have made the law any plainer to the jury with fairness to all parties.

It is true that appellant made objection to the giving of an instruction on sudden emergency but appellant did not make any objection to the instruction as given.

Finally, as we understand the appellant's position, a review of the record fails to show that this point was raised at the time of trial. As is

well known in circumstances of this sort if proper objection is not made at the time of trial it cannot be raised on appeal. Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A., Crockett Engineering Co. v. Ehret Magnesia Mfg. Co., 81 U.S. App. D.C. 159, 156 F.2d 817; Walsh v. Rosenberg, 65 App. D.C. 157, 81 F.2d 559, cert. den. 298 U.S. 663, 56 S.Ct. 747.

CONCLUSION

In conclusion Frank E. Brownell and Mildred Brownell submit that there was no error committed by the trial court and the judgments below should be affirmed in each case.

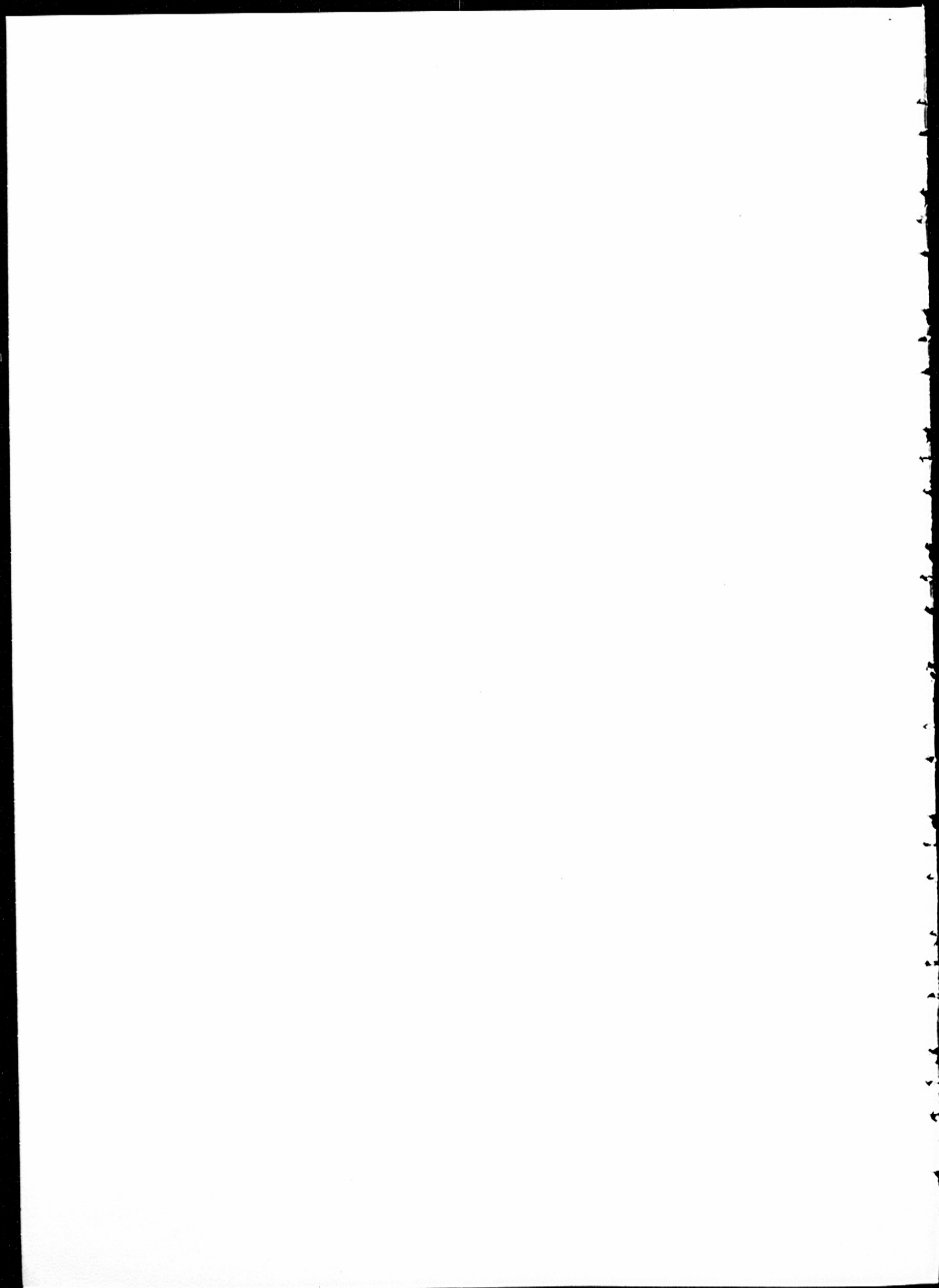
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Of Counsel:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,035

DELLA BLACKWELL,
Appellant,

v.

REGAL CAB COMPANY, ET AL.,
Appellees.

No. 17,036

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v.

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United States Court of Appeals
for the District of Columbia Circuit

No. 17,037

FILED APR 11 1963

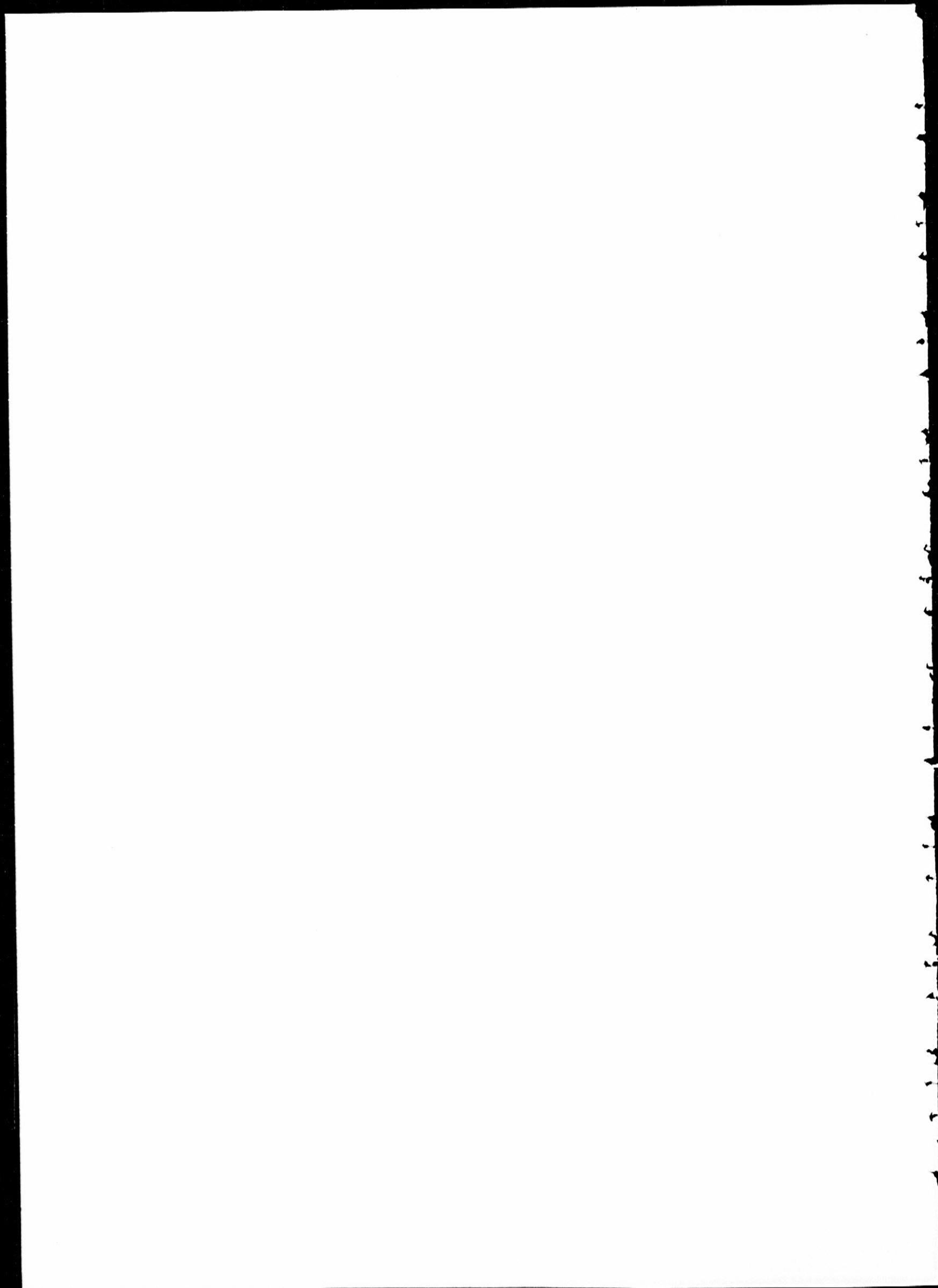
RAOUL D. CARTER,
Appellant,

Nathan J. Paulson
CLERK

v.

REGAL CAB COMPANY, ET AL.,
Appellees.

ANSWER TO PETITION FOR REHEARING EN BANC
ON BEHALF OF APPELLEES
REGAL CAB COMPANY AND CHARLIE SCOTT



The Appellees Regal Cab Company and Charlie Scott oppose the Petition of Appellants for a rehearing En Banc of these cases for the reasons stated hereafter.

Appellants advance three reasons to the Court to grant a rehearing En Banc. Reasons 1 and 2 urge that the majority opinion of the Court conflicts with rule of law established in the case of Matthews v. Lindsey, 108 U.S. App. D.C. 392, 291 F.2d 927 (1960) and Gatton v. Cullins, 78 U.S. App. D.C. 170, 138 F.2d 425. Reason 3 urges that to preserve clarity before the bar, the instant case should be re-examined.

Such reasons were succinctly briefed by all parties; then argued at length; and then fully considered and decided by the Court. The majority opinion clearly reflects awareness of each of the reasons advanced by appellants.

In view of the foregoing, these appellees submit that the petition for rehearing En Banc should be denied.

Respectfully submitted,

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*Attorney for appellees
Regal Cab Company and
Charlie Scott*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing answer to Petition for Rehearing En Banc was mailed, postage prepaid, to Attorney John A. Shorter, Jr., 508 5th Street, N.W., Washington, D.C., attorney for appellants, and to Attorney Allan C. Swingle, 308 Colorado Building, Washington 5, D. C.

Charles F. Hoelzer, Jr.



United States Court of Appeals

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Appellees.

ANSWER TO PETITION FOR REHEARING EN BANC
ON BEHALF OF APPELLEES
FRANK E. BROWNELL and MILDRED BROWNELL

The appellees Frank E. Brownell and Mildred Brownell oppose the Petition of Appellants for a Re-hearing En Banc of these cases for the reasons stated hereafter.

The decision in this case is entirely compatible with that of Matthews v. Lindsay, 102 U.S. App. D.C. 292; 281 F.2d 927 (1960). In the Matthews case an instruction on the doctrine of last clear chance had been given. In pointing out that the defendant is not required to act instantaneously the trial judge stated that if the accident occurred in a sudden emergency the last clear chance doctrine did not apply. This Court felt that the references to a sudden emergency may have been misunderstood by the jury to refer to another and separate theory, rather than to clarify the last clear chance instruction. This Court pointed out the difficulties that could arise from an intertwining separate theory so as to produce confusion in the minds of the jury.

In the case at bar there was no intertwining of theories. The sudden emergency instruction is given all together and separate from any other instruction on pages 610, 611 and 612 of the Transcript, reproduced on pages 76 and 77, of the Joint Appendix. The rule is there set out clearly and all of its requirements are well covered.

In the final few sentences of the charge, some five minutes after the portion above mentioned, the trial judge stated,

"Ask yourselves collectively a series of questions . . . were the defendants or either of them negligent? . . .

"Was the negligence which you have found the proximate cause of the injuries to these plaintiffs? . . . If your answer is yes . . . you then must consider this doctrine of sudden emergency which I have defined in substantial detail to you.

"If you find that the doctrine of sudden emergency is applicable to the defendants' conduct, then you at that point find for the defendant or defendants to whom you apply that standard of conduct. . . ." (Emphasis supplied.)

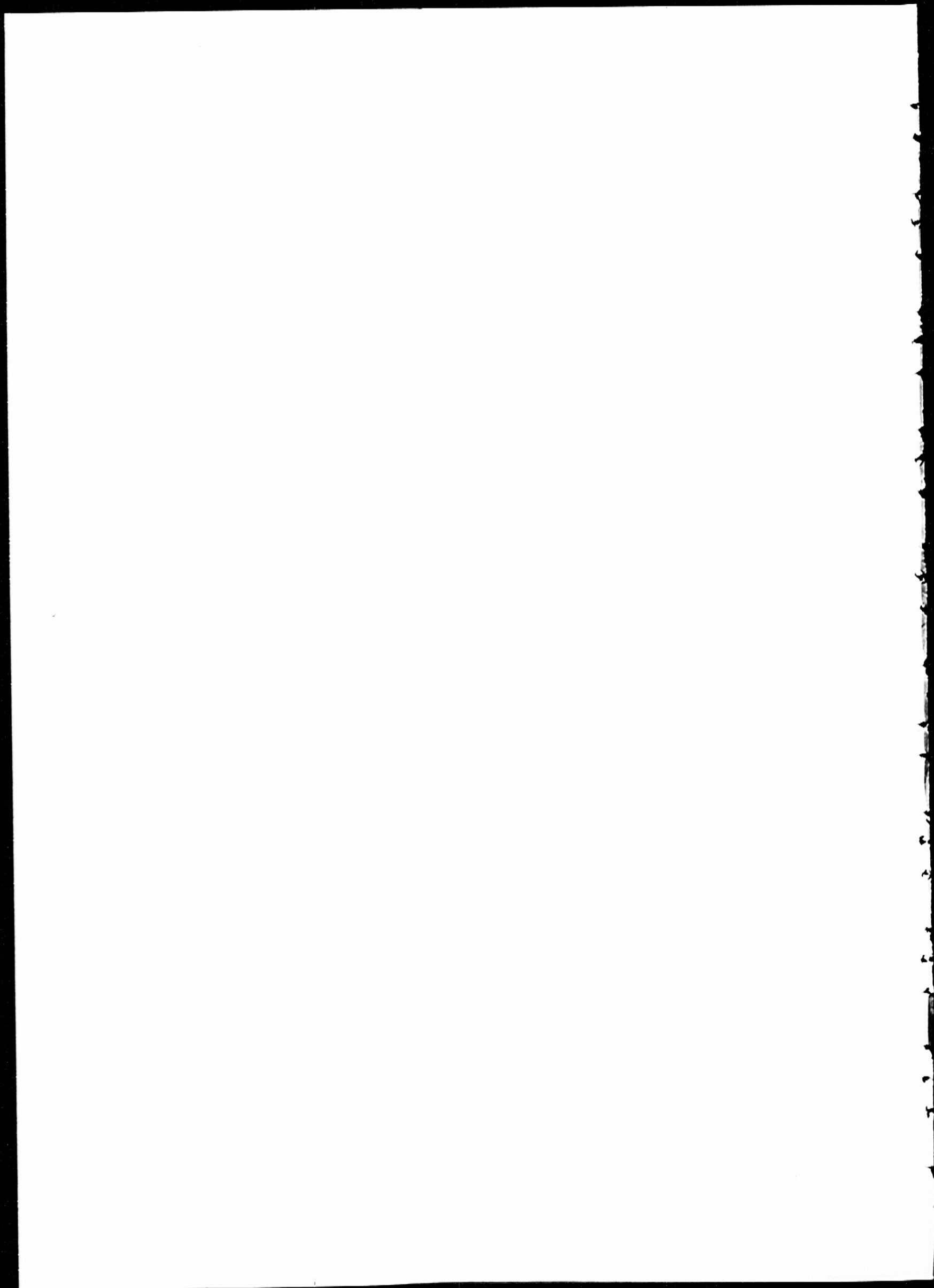
In other words, if the jury found that the sudden emergency doctrine was applicable to the facts as they found them, they should apply the rule previously stated, and if the conduct came within the perimeters of the doctrine a finding for the defendant would be required. The application of the standard of conduct carefully explained elsewhere was a condition precedent to the finding.

Appellant's objection which followed seems to this appellee to run to another point.

Appellants make the basic assumptions that both appellees were negligent as a matter of law, and that there were no choices presented after the emergency arose. As was pointed out in this appellee's brief at pages 7 and 8, the evidence does not exclude other possibilities of evasive action. Appellants assume that if evidence had been developed on this point it would have favored their position in this point.

Indeed there is now no contention that the appellees were negligent once the emergency arose. The introduction of the issue of "sudden emergency" into the case is doubtless responsible for this concession; but, if appellants so contend, the instruction as stated on page 78 of the Joint Appendix is correct even under appellant's interpretation, for the lack of negligence being conceded there is no occasion to apply the "standard of conduct."

Appellants re-argument of the question of the motion for a directed verdict is answered by our reply to this contention in the brief, namely, that there were factual questions presented that could not be resolved as a matter of law. Appellants confuse an oft repeated finding of fact with a rule of law. A "rear end" collision does not automatically brand either participant negligent, nor does the moving of a vehicle when sirens are audible. There was conflicting evidence on this latter point and it was for the jury to decide what the fact of the matter was.



In view of the foregoing, this appellee submits that the petition for rehearing should be denied.

Respectfully submitted,

ALLAN C. SWINGLE

308 Colorado Building
Washington 5, D.C.

*Attorney for Appellees Frank E. Brownell
and Mildred Brownell*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Answer to Petition for Rehearing En Banc was mailed postage prepaid to Charles F. Hoelzer, Jr., Esq., 405 - 4th Street, N.W., Washington, D.C., attorney for the appellees Regal Cab Company, et al., and to attorney John A. Shorter, Jr., Esq., 508 Fifth Street, N.W., attorney for appellants.

Allan C. Swingle

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,035
17,036
17,037

DELLA BLACKWELL, et al.,

Appellants,

v.

REGAL CAB COMPANY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

DEC 21 1962

Joseph W. Stewart

CLERK

(i)

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[Filed April 16, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DELLA BLACKWELL
5339 Blaine Street, N.E.
Washington, D.C.,

Plaintiff

vs.

FRANK E. BROWNELL
3113 Ramblewood Drive
District Heights
Washington 28, D.C.

MILDRED LANE BROWNELL
3113 Ramblewood Drive
District Heights
Washington 28, D.C.

CHARLIE C. SCOTT
514 6th Street, N.E.
Washington, D.C.

MANDEL OURISMAN
7201 Glenbrook Road,
Bethesda, Maryland

FLORENZ OURISMAN
7001 River Road,
Bethesda, Maryland

HAROLD J. HOFF
4201 Massachusetts Avenue, N.W.
Washington, D.C.

NATHAN B. PEVENSTEIN
10103 Gates Avenue,
Silver Spring, Maryland

HOWARD J. CRAGER
11513 Lund Place,
Wheaton, Maryland

and

JAMES A. CLOUGH
5877 Nebraska Avenue, N.W.
Washington, D.C.

Defendants

Civil Action No. 974-58

COMPLAINT FOR PERSONAL INJURIES

The complaint of the plaintiff Della Blackwell, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws for the District of Columbia and the amount involved is more than \$3,000.00, exclusive of interest and costs.
2. That the plaintiff Della Blackwell is a citizen of the United States and a resident of the District of Columbia.
3. That the defendants, Charlie C. Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.
4. That the defendants Frank E. Brownell, Mildred Brownell, Mandell Ourisman, Florenz Ourisman, Nathan B. Pevenstein and Howard J. Crager are citizens of the United States and residents of the State of Maryland.
5. That on to wit, April 2, 1956, the plaintiff Della Blackwell was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N. E., at or near the intersection of Benning Road and Minnesota Avenue, N. E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company, a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein, Howard J. Crager and James A. Clough who were then and there Trading/As Regal Cab Company, Incorporated, a corporation and said defendants were members and officers of the said corporation, or were engaged in a joint business venture for the mutual benefit and profit of all of the said defendants or any or some of them; that at the same time an automobile owned by the defendant Mildred Lane Brownell was being

operated by her agent, the defendant Frank E. Brownell, negligently and carelessly in an easterly direction on Benning Road, N. E., at or near the intersection of Benning Road and Minnesota Avenue, N. E., in the District of Columbia; that the said defendants respectively permitted their automobiles to be driven at the said time and place by their agents in violation of the traffic rules and regulations then and there in effect in the District of Columbia and in a manner so negligent, improper and wanton that the automobiles collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff Della Blackwell sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish; has suffered and will continue to suffer, great physical pain; has expended and will continue to expend, sums of money for hospital and medical care and associated items; and for a long period of time was unable to pursue her normal activities.

WHEREFORE, the plaintiff Della Blackwell demands judgment against the defendants in the sum of \$50,000.00; besides interest and costs.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiff.
* * *

The plaintiff demands trial by jury of all the issues presented herein.

/s/ CURTIS P. MITCHELL

[Filed June 27, 1958]

ANSWER OF THE DEFENDANTS, FRANK E. BROWNELL
AND MILDRED LANE BROWNELL

FIRST DEFENSE

The complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

1. These defendants admit the allegations of Paragraph 1 of the complaint.

2 and 3. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of Paragraphs 2 and 3 of the complaint.

4. These defendants admit their citizenship and residency in the State of Maryland.

5. These defendants admit that at the time and place mentioned in the fifth paragraph of the complaint a collision occurred between an automobile owned by the defendant, Mildred Lane Brownell, and then operated by her agent, Frank E. Brownell, and an automobile operated by Charlie C. Scott. These defendants deny all allegations of negligence charged against them and have no knowledge or information sufficient to form a belief concerning the remaining allegations of said paragraph.

6. These defendants have no knowledge or information sufficient to form a belief concerning the injuries, losses and damages alleged in Paragraph 6 of the complaint.

THIRD DEFENSE

Such injuries, losses and damages as the plaintiff may have sustained were the result of her sole negligence or contributory negligence, or were the result of the sole or contributory negligence of the co-defendants and their negligent violation of the Motor Vehicle Laws and Regulations for the District of Columbia then and there in full force and effect.

SWINGLE AND SWINGLE

/s/ ALLAN C. SWINGLE
Attorneys for Defts. Brownell

* * *

[Certificate of Service]

[Filed March 9, 1959]

AMENDED COMPLAINT FOR PERSONAL INJURIES

The complaint of the plaintiff DELLA BLACKWELL, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws for the District of Columbia and the amount involved is more than \$3,000.00, exclusive of interest and costs.

2. That the plaintiff DELLA BLACKWELL is a citizen of the United States and a resident of the District of Columbia.

3. That the defendants, Charlie C. Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.

4. That the defendants Frank E. Brownell, Mildred Brownell, Mandell Ourisman, Florenze Ourisman, Nathan B. Pevenstein are citizens of the United States and are residents of the State of Maryland; and the defendant Regal Cab Company is a corporation doing and licensed to do business in the District of Columbia.

5. That on to wit, April 2, 1956, the Plaintiff DELLA BLACKWELL was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N. E., at or near the intersection of Benning Road and Minnesota Avenue, N. E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company, a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendant Regal Cab Company and the defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough who were then and there trading as Regal Cab Company, Incorporated, a corporation and said defendants were members of and officers of the said corporation, or were engaged in a joint business venture for

the mutual benefit and profit of all the said defendants or any or some of them that at the same time an automobile owned by the defendant Mildred Lane Brownell was being operated with her knowledge and consent by her agent, the defendant Frank E. Brownell negligently and carelessly in an easterly direction on Benning Road, N. E., at or near the intersection of Benning Road and Minnesota Avenue, N. E., in the District of Columbia; that the said defendants respectively permitted their automobiles to be driven at the said time and place by their agents in violation of the traffic rules and regulation then and there in effect in the District of Columbia and in a manner so negligent, improper and wanton that the automobile collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff DELLA BLACKWELL sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish; has suffered and will continue to suffer, great physical pain; has expended and will continue to expend, sums of money for hospital and medical care and associated items; and for a long period of time was unable to pursue her normal activities.

WHEREFORE, the plaintiff DELLA BLACKWELL demands judgment against the defendants in the sum of \$50,000.00; besides interest and cost.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiff

* * *

[Certificate of Service]

[Filed June 4, 1959]

ANSWER OF DEFENDANT REGAL CAB COMPANY TO THE
AMENDED COMPLAINT

FIRST DEFENSE

The amended complaint fails to state a cause of action against

defendant Regal Cab Company upon which relief may be granted.

SECOND DEFENSE

1. Defendant Regal Cab Company admits that on April 2, 1956, plaintiff was a passenger in a taxicab bearing its insignia and an accident occurred. Said defendant denies negligence.

2. Defendant Regal Cab Company denies that the taxicab referred to in paragraph five of the amended complaint was operated by its agent, servant or employee; denies that defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough were trading as Regal Cab Company; denies that said individual defendants were members of the defendant corporation and denies that it was engaged with said individual defendants in a joint business venture.

3. Defendant Regal Cab Company is without knowledge or information sufficient to form a belief concerning any injuries or damages sustained by plaintiff.

4. Defendant Regal Cab Company denies each and every other material allegation contained in the amended complaint and directed to it not herein specifically answered.

THIRD DEFENSE

Any injuries or damages sustained by plaintiff were caused solely and proximately by the negligence of defendants Frank E. Brownell and Mildred Lane Brownell.

FOURTH DEFENSE

The right of action set forth in the amended complaint did not accrue within three years next before the commencement of this action against defendant Regal Cab Company.

/s/ J. LAWRENCE HALL

* * *

Attorney for defendant
Regal Cab Company

[Certificate of Service]

[Filed October 27, 1960]

PLAINTIFF'S PRE-TRIAL STATEMENT

a. Occurrence

The plaintiff sues the defendants for personal injuries which resulted from the collision between the vehicles owned and operated by the defendants on April 2, 1956, at or near the intersection of Benning Road and Minnesota Avenue, N. E. Washington, D. C.; that on the aforesaid date, plaintiff was a paying passenger in the taxi cab which was then and there being operated by the defendant Charlie C. Scott, which vehicle bore the insignia of the defendant Regal Cab Company; that the defendant Charlie C. Scott suddenly and without warning and without exercising proper care or caution stopped the said vehicle, and was at that time, because of his negligence and the negligence of the defendant Frank E. Brownell, who was at the time operating a motor vehicle owned by the defendant Mildred Lane Brownell, with her knowledge and consent, responsible for the collision of the two vehicles, thereby causing the plaintiff to sustain the injuries of which she complained.

b. Theory of Liability

The defendants, either or all of them were negligent and thereby liable to the plaintiff for the injuries sustained and that the cause of the accident was within the exclusive control of the defendants, either or all of them in that the two vehicles involved were operated in a very careless and negligent manner and/or in violation of certain traffic regulations of the District of Columbia, then and there in effect:

c. Specific Acts of Negligence

1. Failure of operators to give full time and attention to the operation of their vehicles.
2. Operating an unsafe vehicle.
3. Failure to slow down at intersection.
4. Failure to keep proper lookout.
5. Unreasonable speeding.
6. Improper driving under the circumstances.

7. Following too closely.
8. Failure to give the right of way.
9. Failure to give proper warning or signal.
10. Colliding.
11. Failure to exercise due care and caution.
12. Failure to exercise due care and caution in entering the intersection.
13. Failure to have had vehicles under control so as to avoid the collision.
14. The plaintiff also relies upon the doctrine of Res Ipsa Loquitur.

d. Plaintiff's Injuries

The plaintiff suffered the following personal injuries:

1. Cerebral concussion.
2. Whip lash injury.
3. Aggravation of sub-luxed cervical spine and cervical sprain.
4. Low back sprain.
5. Injuries to the shoulders and arms with attendant hyperthesia.
6. Shortening of the ligaments of the neck.
7. Damage to the occipital nerves.
8. Permanent disability in terms of shortening of muscles, shortening of ligaments, and recurring attacks of pain in the neck, shoulders and arms.

e. Plaintiff's Expenditures

Some of the expenses incurred by plaintiff as a result of the accident are:

1. Dr. James Peter Murphy	\$ 35.00
2. Dr. Robert R. Nelson	55.00
3. Freedman's Hospital	160.00
4. Dr. Clarence Green	200.00 (approximated)
5. Dr. Robert J. Gladden	200.00 (approximated)
6. Payments made to Berlina Monk (housekeeper)	32.80
7. Othropic collar	25.00 (approximated)
8. Prescriptions and Medicines	50.00 (approximated)

f. Requested Stipulations

Plaintiff requests the following stipulations:

1. Admission of hospital records, reports and X-rays without formal proof, subject to the usual objections.
2. Admission of the Traffic Regulations of the District of Columbia without formal proof, subject to the usual objections.
3. D. C. Government plots and plans of the highway and street areas involved.
4. Records of the Fire Department and Police Department of the District of Columbia.
5. The parties to exchange the names and addresses of known witnesses.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiff

* * *

[Filed April 16, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YURRISAN CARTER, a minor by her grand-)
mother, and next friend, DELLA BLACKWELL,)
and DELLA BLACKWELL, individually)
5339 Blaine Street, N. E.)
Washington, D. C.)

Plaintiffs

vs.

Civil Action No.
975-58

FRANK E. BROWNELL)
3113 Ramblewood Drive)
District Heights)
Washington, 28, D.C.)

MILDRED LANE BROWNELL)
3113 Ramblewood Drive)
District Heights)
Washington 28, D. C.)

CHARLIE C. SCOTT)
514 6th Street, N. E.)
Washington, D. C.)

MANDEL OURISMAN)
7201 Glenbrook Road,)
Bethesda, Maryland)

FLORENZ OURISMAN)
7001 River Road,)
Bethesda, Maryland)

HAROLD J. HOFF)
4201 Massachusetts Avenue, N.W.)
Washington, D.C.)

NATHAN B. PEVENSTEIN)
10103 Gates Avenue,)
Silver Spring, Maryland)

HOWARD J. CRAGER)
11513 Lund Place,)
Wheaton, Maryland)

and

JAMES A. CLOUGH)
5877 Nebraska Avenue, N.W.)
Washington, D.C.)

Defendants

COMPLAINT FOR PERSONAL INJURIES
AND LOSS OF SERVICES

The complaint of the plaintiff Yurrisan Carter by her grandmother and next friend, Della Blackwell, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws for the District of Columbia and the amount involved is more than \$3,000.00 exclusive of interest and costs.

2. That the plaintiff Yurrisan Carter, age years, is a minor suing by her grandmother and next friend, Della Blackwell, and both plaintiffs are citizens of the United States and residents of the District of Columbia.

3. That the defendants, Charlie C. Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.

4. That the defendants Frank E. Brownell, Mildred Brownell, Mandell Ourisman, Florenz Ourisman, Nathan B. Pevenstein and Howard J. Crager are citizens of the United States and residents of the State of Maryland.

5. That on to wit, April 2, 1956, the minor plaintiff Yurrisan Carter was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company, a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein, Howard J. Crager and James A. Clough who were then and there Trading/As Regal Cab Company, Incorporated, a corporation

and said defendants were members and officers of the said corporation, or were engaged in a joint business venture for the mutual benefit and profit of all of the said defendants or any or some of them; that at the same time an automobile owned by the defendant Mildred Lane Brownell was being operated with her knowledge and consent by her agent, the defendant Frank E. Brownell, negligently and carelessly in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia; that the said defendants respectively permitted their automobiles to be driven at the said time and place by their agents in violation of the traffic rules and regulations then and there in effect in the District of Columbia and in a manner so negligent, improper and wanton that the automobiles collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff Yurrisan Carter sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish, has suffered and will continue to suffer great physical pain.

WHEREFORE, the premises considered, the minor plaintiff Yurrisan Carter prays for judgment against the defendants in the sum of \$50,000.00, plus costs.

COUNT TWO

Comes now the plaintiff, Della Blackwell individually and for a second cause of action states as follows:

1. That the plaintiff Della Blackwell repeats each and every allegation set forth in the first cause of action.

2. That the plaintiff Della Blackwell is the maternal grandmother and next friend of the minor plaintiff Yurrisan Carter herein, and as such was responsible for her care, welfare, maintenance and support and was entitled to her services.

3. That as a result of the occurrences alleged in the first cause of action this plaintiff was compelled to and did expend and incurred liability for divers sums of money for the professional medical care necessitated

by the injuries sustained by the said minor plaintiff.

4. That as a result of the occurrences alleged in the first cause of action herein this plaintiff was deprived of the comfort and services of said minor plaintiff.

WHEREFORE, the plaintiff Della Blackwell demands judgment against the defendants in the sum of \$25,000.00, plus costs.

/s/ CURTIS P. MITCHELL

[Filed June 27, 1958]

ANSWER OF THE DEFENDANTS, FRANK E. BROWNELL
AND MILDRED LANE BROWNELL

COUNT I

FIRST DEFENSE

Count I of the complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

1. These defendants admit the allegations of Paragraph 1, Count I, of the complaint.

2 and 3. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of Paragraphs 2 and 3, Count I, of the complaint.

4. These defendants admit their citizenship and residency in the State of Maryland.

5. These defendants admit that at the time and place mentioned in the fifth paragraph, Count I, of the complaint a collision occurred between an automobile owned by the defendant, Mildred Lane Brownell, and then operated by her agent, Frank E. Brownell, and an automobile operated by Charlie C. Scott. These defendants deny all allegations of negligence charged against them and have no knowledge or information sufficient to form a belief concerning the remaining allegations of said paragraph.

6. These defendants have no knowledge or information sufficient to form a belief concerning the injuries, losses and damages alleged in Paragraph 6, Count I, of the complaint.

COUNT II

FIRST DEFENSE

Count II of the complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

1. These defendants in answer to Paragraph 1 of Count II of the complaint repeat each and every defense set forth in the first cause of action.

2 and 3. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of Paragraph 2 and 3, Count II, of the complaint.

4. These defendants deny the allegations contained in Paragraph 4, Count II, of the complaint.

THIRD DEFENSE

Such injuries, losses and damages as the plaintiff, Della Blackwell, may have sustained were the result of her sole negligence or contributory negligence, or that of the co-defendants and their negligent violation of the Traffic and Motor Vehicle Laws and Regulations for the District of Columbia then and there in full force and effect.

SWINGLE AND SWINGLE

By/s/ ALLAN C. SWINGLE
Attorneys for Defts. Brownell
* * *

[Certificate of Service]

[Filed March 10, 1959]

**AMENDED COMPLAINT FOR PERSONAL INJURIES AND
LOSS OF SERVICES**

The complaint of the Plaintiff YURRISSAN CARTER by her grandmother and next friend, DELLA BLACKWELL, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws of the District of Columbia and the amount involved is more than \$3,000.00 exclusive of interest and cost.

2. That the Plaintiff YURRISSAN CARTER age 6 years, is a minor suing by her grandmother and next friend, DELLA BLACKWELL, and both plaintiffs are citizens of the United States and residents of the District of Columbia.

3. That the defendants, Charlie Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.

4. That the defendants Frank E. Brownell, Mildred Lane Brownell, Mandell Ourisman, Florenz Ourisman, Nathan B. Pevenstein are citizens of the United States and are residents of the State of Maryland; and the defendant Regal Cab Company is a corporation doing and licensed to do business in the District of Columbia.

5. That on to wit, April 2, 1956, the minor plaintiff YURRISSAN CARTER was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N.E. at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendant Regal Cab Company and the defendants Mandel

Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough who were then and there trading as Regal Cab Company, Incorporated, a corporation and said defendants were members and officers of the said corporation, or were engaged in a joint business venture for the mutual benefit and profit of all the said defendants or any or some of them that at the same time an automobile owned by the defendant Mildred Lane Brownell was being operated with her knowledge and consent by her agent, the defendant Frank E. Brownell negligently and carelessly in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia; that the said defendants respectively permitted their automobiles to be driven at the said time and place by their agents in violation of the traffic rules and regulations then and there in effect in the District of Columbia and in a manner so negligent, improper and wanton that the automobile collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff YURRIS-SAN CARTER sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish, she suffered and will continue to suffer great physical pain.

WHEREFORE, the premises considered, the minor plaintiff YURRISSAN CARTER prays for judgment against the defendants in the sum of \$50,000.00 plus costs.

COUNT TWO

Comes now the plaintiff, DELLA BLACKWELL individually and for a second cause of action as follows:

1. That the plaintiff DELLA BLACKWELL repeats each and every allegation set forth in the first cause of action.

2. That the plaintiff DELLA BLACKWELL is the maternal grandmother and next friend of the minor plaintiff YURRISSAN CARTER herein, and as such was responsible for her care, welfare, maintenance and support and was entitled to her services.

3. That as a result of the occurrences alleged in the first cause of action this plaintiff was compelled to and did expend and incurred liability for divers sums of money for the professional medical care necessitated by the injuries sustained by the said minor plaintiff.

4. That as a result of the occurrences alleged in the first cause of action herein this plaintiff was deprived of the comfort and services of said minor plaintiff.

WHEREFORE, the plaintiff DELLA BLACKWELL demands judgment against the defendants in the sum of \$25,000.00, plus costs.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiff

* * *

[Certificate of Service]

[Filed June 4, 1959]

ANSWER OF DEFENDANT REGAL CAB COMPANY TO THE
AMENDED COMPLAINT

FIRST DEFENSE

The amended complaint fails to state a cause of action against defendant Regal Cab Company upon which relief may be granted.

SECOND DEFENSE

1. Defendant Regal Cab Company admits that on April 2, 1956 the minor plaintiff was a passenger in a taxicab bearing its insignia and an accident occurred. Said defendant denies negligence.

2. Defendant Regal Cab Company denies that the taxicab referred to in paragraph five of the amended complaint was operated by its agent, servant or employee; denies that defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough were trading as Regal Cab Company; denies that said individual defendants were members of the defendant corporation and denies that it was engaged with said individual defendants in a joint business venture.

3. Defendant Regal Cab Company is without knowledge or information sufficient to form a belief concerning any injuries or damages sustained by plaintiffs.

4. Defendant Regal Cab Company denies each and every other material allegation contained in the amended complaint and directed to it not herein specifically answered.

THIRD DEFENSE

Any injuries or damages sustained by plaintiffs were caused solely and proximately by the negligence of defendants Frank E. Brownell and Mildred Lane Brownell.

FOURTH DEFENSE

The right of action set forth in the amended complaint did not accrue within three years next before the commencement of this action against defendant Regal Cab Company.

/s/ J. LAWRENCE HALL

* * *

Attorney for defendant
Regal Cab Company

[Certificate of Service]

[Filed October 27, 1960]

PLAINTIFFS' PRE-TRIAL STATEMENT

a. Occurrence

The plaintiffs sue the defendants for personal injuries which resulted from the collision between the vehicles owned and operated by the defendants on April 2, 1956, at or near the intersection of Benning Road and Minnesota Avenue, N.E., Washington, D.C.; that on the aforesaid date, plaintiff was a paying passenger in the taxicab which was then and there being operated by the defendant Charlie C. Scott, which vehicle bore the insignia of the defendant Regal Cab Company; that the defendant Charlie C. Scott suddenly and without warning and without exercising

proper care or caution stopped the said vehicle, and was at that time, because of his negligence and the negligence of the defendant Frank E. Brownell, who was at the time operating a motor vehicle owned by the defendant Mildred Lane Brownell, and her knowledge and consent, responsible for the collision of the two vehicles, thereby causing the plaintiff to sustain the injuries of which he complained.

b. Theory of Liability

The defendants, either or all of them were negligent and thereby liable to the plaintiff for the injuries sustained and that the cause of the accident was within the exclusive control of the defendants, either or all of them in that the two vehicles involved were operated in a very careless and negligent manner and/or in violation of certain traffic regulations of the District of Columbia, then and there in effect.

c. Specific Acts of Negligence

1. Failure of operators to give full time and attention to the operation of their vehicles.
2. Operating an unsafe vehicle.
3. Failure to slow down at intersection.
4. Failure to keep proper lookout.
5. Unreasonable speeding.
6. Improper driving under the circumstances.
7. Following too closely.
8. Failure to give the right of way.
9. Failure to give proper warning or signal.
10. Colliding.
11. Failure to exercise due care and caution.
12. Failure to exercise due care and caution in entering the intersection.
13. Failure to have had vehicles under control so as to avoid the collision.
14. The plaintiff also relies upon the doctrine of Res Ipsa Loquitur.

d. Plaintiff's Injuries

The plaintiff suffered the following personal injuries:

1. Whiplash injury.
2. Injury to the lower back (lumbar sacral) resulting in loss of appetite and weight.
3. Extreme nervousness.
4. Traumatic injury to the nerve roots.
5. Emotional instability and hysteria.
6. Injury to shoulder and arms.
7. Post-traumatic headaches.
8. Contusions of left shoulder.
9. Nausea and vomiting.

e. Plaintiff's Expenditures

Some of the expenses incurred by plaintiff as a result of the accident are:

- | | |
|-------------------------|----------|
| 1. Bette L. Catoe, M.D. | \$125.00 |
| 2. Dr. Robert R. Nelson | 39.00 |

f. Requested Stipulations

Plaintiff requests the following stipulations:

1. Admission of hospital records, reports and X-rays without formal proof, subject to the usual objections.
2. Admission of the Traffic Regulations of the District of Columbia without formal proof, subject to the usual objections.
3. D. C. Government plots and plans of the highway and street areas involved.
4. Records of the Fire Department and Police Department of the District of Columbia.
5. The parties to exchange the names and addresses of known witnesses.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiffs

* * *

[Filed April 16, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAOUL D. CARTER, a minor by his grand-
mother, and next friend, DELLA BLACKWELL,
and DELLA BLACKWELL, individually
5339 Blaine Street, N.E.
Washington, D.C.

Plaintiffs

vs.

Civil Action No.
976-58

FRANK E. BROWNELL
3113 Ramblewood Drive
District Heights
Washington 28, D.C.

MILDRED LANE BROWNELL
3113 Ramblewood Drive
District Heights
Washington 28, D.C.

CHARLIE C. SCOTT
514 - 6th Street, N.E.
Washington, D.C.

MANDEL OURISMAN
7201 Glenbrook Road,
Bethesda, Maryland

FLORENZ OURISMAN
7001 River Road,
Bethesda, Maryland

HAROLD J. HOFF
4201 Massachusetts Avenue, N.W.
Washington, D.C.

NATHAN B. PEVENSTEIN
10103 Gates Avenue,
Silver Spring, Maryland

HOWARD J. CRAGER
11513 Lund Place,
Weaton, Maryland

and

JAMES A. CLOUGH
5877 Nebraska Avenue, N.W.
Washington, D.C.

Defendants

**COMPLAINT FOR PERSONAL INJURIES
AND LOSS OF SERVICES**

The complaint of the plaintiff Raoul D. Carter by his grandmother and next friend, Della Blackwell, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws for the District of Columbia and the amount involved is more than \$3,000.00 exclusive of interest and costs.

2. That the plaintiff Raoul D. Carter, age 3 years, is a minor suing by his grandmother and next friend, Della Blackwell, and both plaintiffs are citizens of the United States and residents of the District of Columbia.

3. That the defendants, Charlie C. Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.

4. That the defendants Frank E. Brownell, Mildred Brownell, Mandell Ourisman, Florenz Ourisman, Nathan B. Pevenstein and Howard J. Crager are citizens of the United States and residents of the State of Maryland.

5. That on to wit, April 2, 1956, the minor plaintiff Raoul D. Carter was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company, a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein, Howard J. Crager and James A. Clough who were then and there Trading/As Regal Cab Company, Incorporated, a corporation and said defendants were members and officers of the said

corporation, or were engaged in a joint business venture for the mutual benefit and profit of all of the said defendants or any or some of them; that at the same time an automobile owned by the defendant Mildred Lane Brownell was being operated with her knowledge and consent by her agent, the defendant Frank E. Brownell, negligently and carelessly in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia; that the said defendants respectively permitted their automobiles to be driven at the said time and place by their agents in violation of the traffic rules and regulations then and there in effect in the District of Columbia and in a manner so negligent, improper and wanton that the automobiles collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff Raoul D. Carter sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish, has suffered and will continue to suffer great physical pain.

WHEREFORE, the premises considered, the minor plaintiff Raoul D. Carter prays for judgment against the defendants in the sum of \$50,000.00, plus costs.

COUNT TWO

Comes now the plaintiff, Della Blackwell individually and for a second cause of action states as follows:

1. That the plaintiff Della Blackwell repeats each and every allegation set forth in the first cause of action.

2. That the plaintiff Della Blackwell is the maternal grandmother and next friend of the minor plaintiff Raoul D. Carter herein, and as such was responsible for his care, welfare, maintenance and support and was entitled to his services.

3. That as a result of the occurrences alleged in the first cause of action this plaintiff was compelled to and did expend and incurred liability for divers sums of money for the professional medical care necessitated by the injuries sustained by the said minor plaintiff.

4. That as a result of the occurrences alleged in the first cause of action herein this plaintiff was deprived of the comfort and services of said minor plaintiff.

WHEREFORE, the plaintiff Della Blackwell demands judgment against the defendants in the sum of \$25,000.00, plus costs.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiffs
* * *

JURY DEMAND

The plaintiffs demand trial by Jury of all the issues presented herein.

/s/ CURTIS P. MITCHELL

[Filed June 27, 1958]

ANSWER OF THE DEFENDANTS, FRANK E. BROWNELL AND MILDRED LANE BROWNELL

COUNT I

FIRST DEFENSE

Count I of the complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

1. These defendants admit the allegation of Paragraph 1, Count I, of the complaint.

2 and 3. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of Paragraphs 2 and 3, Count I, of the complaint.

4. These defendants admit their citizenship and residency in the State of Maryland.

5. These defendants admit that at the time and place mentioned in the complaint, fifth paragraph, Count I, a collision occurred between an automobile owned by the defendant, Mildred Lane Brownell, and then

operated by her agent, Frank E. Brownell, and an automobile operated by Charlie C. Scott. These defendants deny all allegations of negligence charged against them and have no knowledge or information sufficient to form a belief concerning the remaining allegations of said paragraph.

6. These defendants have no knowledge or information sufficient to form a belief concerning the injuries, losses and damages alleged in Paragraph 6, Count I, of the complaint.

COUNT II

FIRST DEFENSE

Count II of the complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

1. These defendants in answer to Paragraph 1 of Count II of the complaint repeat each and every defense set forth in the first cause of action.

2 and 3. These defendants have no knowledge or information sufficient to form a belief concerning the allegations of Paragraph 2 and 3, Count II, of the complaint.

4. These defendants deny the allegations contained in Paragraph 4, Count II, of the complaint.

THIRD DEFENSE

Such injuries, losses and damages as the plaintiff, Della Blackwell, may have sustained were the result of her sole negligence or contributory negligence, or that of the co-defendants and their negligent violation of the Traffic and Motor Vehicle Laws and Regulations for the District of Columbia then and there in full force and effect.

SWINGLE AND SWINGLE

By /s/ ALLAN C. SWINGLE
Attorneys for Defts. Brownell

* * *

[Certificate of Service]

[Filed March 9, 1959]

**AMENDED COMPLAINT FOR PERSONAL INJURIES AND
LOSS OF SERVICES**

The complaint of the Plaintiff RAOUL D. CARTER by his grandmother and next friend, DELLA BLACKWELL, respectfully represents unto this Honorable Court as follows:

COUNT ONE

1. That jurisdiction of this Court is founded upon the Code of Laws of the District of Columbia and the amount involved is more than \$30,000.00 exclusive of interest and cost.

2. That the Plaintiff RAOUL CARTER age 3 years, is a minor suing by his grandmother and next friend, DELLA BLACKWELL, and both plaintiffs are citizens of the United States and residents of the District of Columbia.

3. That the defendants, Charlie Scott, Harold J. Hoff and James A. Clough, so far as your plaintiffs know are citizens of the United States and residents of the District of Columbia.

4. That the defendants Frank E. Brownell, Mildred Lane Brownell, Mandell Ourisman, Florenz Ourisman, Nathan B. Pevenstein are citizens of the United States and residents of the State of Maryland; and the defendant Regal Cab Company is a corporation doing and licensed to do business in the District of Columbia.

5. That on to wit, April 2, 1956, the minor plaintiff RAOUL CARTER was a passenger for hire in an automobile negligently and carelessly operated by the defendant Charlie C. Scott in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia, the said defendant Charlie C. Scott was then and there operating the vehicle for hire, which vehicle bore the insignia of the Regal Cab Company, a corporation, doing business in the District of Columbia and the same was operated by the defendant Charlie C. Scott as the agent, servant or employee of the defendant Regal Cab Company and the defendants Mandel Ourisman,

Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough who were then and there trading as Regal Cab Company, Incorporated, a corporation and said defendants were members and officers of the said corporation, or were engaged in a joint business venture for the mutual benefit and profit of all the said defendants or any or some of them that at the same time an automobile owned by the defendant Mildred Lane Brownell was being operated with her knowledge and consent by her agent, the defendant Frank E. Brownell negligently and carelessly in an easterly direction on Benning Road, N.E., at or near the intersection of Benning Road and Minnesota Avenue, N.E., in the District of Columbia; that the said defendants respectively permitted their agents in violation of the District of Columbia and in a manner so negligent, improper and wanton that the automobile collided violently, and seriously injured your plaintiff.

6. As a result of the collision as aforesaid, the plaintiff RAOUL CARTER sustained severe, permanent and painful injuries in and about the head, body and limbs; nervous shock and mental anguish, he suffered and will continue to suffer great physical pain.

WHEREFORE, the premises considered, the minor plaintiff RAOUL CARTER prays for judgment against the defendants in the sum of \$50,000.00 plus costs.

COUNT TWO

Comes now the plaintiff, DELLA BLACKWELL individually and for a second cause of action as follows:

1. That the plaintiff DELLA BLACKWELL repeats each and every allegation set forth in the first cause of action.

2. That the plaintiff DELLA BLACKWELL is the maternal grandmother and next friend of the minor plaintiff RAOUL CARTER herein, and as such was responsible for his care, welfare, maintenance and support and was entitled to his services.

3. That as a result of the occurrences alleged in the first cause of action this plaintiff was compelled to and did expend and incurred liability for divers sums of money for the professional medical care

necessitated by the injuries sustained by the said minor plaintiff.

4. That as a result of the occurrences alleged in the first cause of action herein this plaintiff was deprived of the comfort and services of said minor plaintiff.

WHEREFORE, the plaintiff DELLA BLACKWELL demands judgment against the defendants in the sum of \$25,000.00, plus cost.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiffs

* * *

[Certificate of Service]

[Filed June 4, 1959]

ANSWER OF DEFENDANT REGAL CAB COMPANY TO
THE AMENDED COMPLAINT

FIRST DEFENSE

The amended complaint fails to state a cause of action against defendant Regal Cab Company upon which relief may be granted.

SECOND DEFENSE

1. Defendant Regal Cab Company admits that on April 2, 1956, the minor plaintiff was a passenger in a taxicab bearing its insignia and an accident occurred. Said defendant denies negligence.

2. Defendant Regal Cab Company denies that the taxicab referred to in paragraph five of the amended complaint was operated by its agent, servant or employee; denies defendants Mandel Ourisman, Florenz Ourisman, Harold J. Hoff, Nathan B. Pevenstein and James A. Clough were trading as Regal Cab Company; denies that said individual defendants were members of the defendant corporation and denies that it was engaged with said individual defendants in a joint business venture.

3. Defendant Regal Cab Company is without knowledge or information sufficient to form a belief concerning any injuries or damages sustained by plaintiffs.

4. Defendant Regal Cab Company denies each and every other material allegation contained in the amended complaint and directed to it not herein specifically answered.

THIRD DEFENSE

Any injuries or damages sustained by plaintiffs were caused solely and proximately by the negligence of defendants Frank E. Brownell and Mildred Lane Brownell.

FOURTH DEFENSE

The right of action set forth in the amended complaint did not accrue within three years next before the commencement of this action against defendant Regal Cab Company.

/s/ J. LAWRENCE HALL

* * *

Attorney for defendant
Regal Cab Company

[Certificate of Service]

[Filed October 27, 1962]

PLAINTIFFS' PRE-TRIAL STATEMENT

a. Occurrence

The plaintiffs sue the defendants for personal injuries which resulted from the collision between the vehicles owned and operated by the defendants on April 2, 1956, at or near the intersection of Benning Road and Minnesota Avenue, N.E., Washington, D.C.; that on the aforesaid date, plaintiff was a paying passenger in the taxicab which was then and there being operated by the defendant Charlie C. Scott, which vehicle bore the insignia of the defendant Regal Cab Company; that the defendant Charlie C. Scott suddenly and without warning and without exercising proper care or caution stopped the said vehicle, and was at that time, because of his negligence and the negligence of the defendant Frank E. Brownell, who was at the time operating a motor vehicle owned by the defendant

Mildred Lane Brownell, with her knowledge and consent, responsible for the collision of the two vehicles, thereby causing the plaintiff to sustain the injuries of which he complained. The plaintiff, Della Blackwell, sues for the loss of the comfort and services of the minor defendant Raoul Carter.

b. Theory of Liability

The defendants, either or all of them, were negligent and thereby liable to the plaintiffs for the injuries sustained and that the cause of the accident was within the exclusive control of the defendants, either or all of them in that the two vehicles involved were operated in a very careless and negligent manner and/or in violation of certain traffic regulations of the District of Columbia, then and there in effect.

c. Specific Acts of Negligence

1. Failure of operators to give full time and attention to the operation of their vehicles.
2. Operating an unsafe vehicle.
3. Failure to slow down at intersections.
4. Failure to keep proper lookout.
5. Unreasonable speeding.
6. Improper driving under the circumstances.
7. Following too closely.
8. Failure to give the right of way.
9. Failure to give proper warning or signal.
10. Colliding.
11. Failure to exercise due care and caution.
12. Failure to exercise due care and caution in entering the intersection.
13. Failure to have had vehicles under control so as to avoid the collision.
14. The plaintiffs also rely upon the doctrine of Res Ipsa Loquitur.

d. Plaintiff's Injuries

The plaintiff suffered the following personal injuries:

1. Loss of upper incisors.

2. Hyperactive reflexes.
3. Forehead and under left eye have permanent scars.
4. Extreme nervousness.
5. Cerebral concussion and post-cerebral concussion syndrome.
6. Changes in personality.
7. Traumatic neurosis.
8. Whiplash injury.
9. Petite mal seizures.

e. Plaintiff's Expenditures

Some of the expenses incurred by plaintiff as a result of the accident are:

- | | |
|-------------------------|-----------------------|
| 1. Joseph Earle D.D.S. | \$ 15.00 |
| 2. Dr. Bette L. Catoe | 185.00 (approximated) |
| 3. Dr. Robert L. Nelson | 35.00 |
| 4. Freedman's Hospital | 3.00 |

f. Requested Stipulations

Plaintiff requests the following stipulations:

1. Admission of hospital records, reports and X-rays without formal proof, subject to the usual objections.
2. Admission of the Traffic Regulations of the District of Columbia without formal proof, subject to the usual objections.
3. D. C. Government plots and plans of the highway and street areas involved.
4. Records of the Fire Department and Police Department of the District of Columbia.
5. The parties to exchange the names and addresses of known witnesses.

/s/ CURTIS P. MITCHELL
Attorney for Plaintiffs
* * *

[Filed October 26, 1960]

DELLA BLACKWELL

Civil Action No. 974-58

v.

FRANK E. BROWNELL, et al

YURRISSAN CARTER

Civil Action No. 975-58

v.

FRANK E. BROWNELL, et al

RAOUL D. CARTER

Civil Action No. 976-58

v.

FRANK E. BROWNELL, et al

ORDER FOR CONSOLIDATION

The parties to the above actions being in agreement that they should be consolidated for trial, it is hereby

ORDERED, That the same be, and hereby are, consolidated for trial.

/s/ Edward A. Tamm
JUDGE [10/26/60]

Consent:

/s/ Curtis P. Mitchell

/s/ Albert Swingle

/s/ J. Lawrence Hall

/s/ Hugh A. M. Shafer, Jr.

[Filed October 27, 1960]

**PRE-TRIAL STATEMENT OF DEFENDANTS REGAL CAB
COMPANY, CHARLIE C. SCOTT, MANDEL OURISMAN,
FLORENZE OURISMAN, HAROLD J. HOFF, NATHAN B.
PREVENSTEIN AND JAMES B. CLOUGH**

1. The above defendants admit that on April 2, 1956 plaintiffs were passengers in a taxicab owned and driven by defendant Scott and bearing the color scheme and insignia of defendant Regal. The taxicab had been traveling east on Benning Road and came to a stop at Minnesota Avenue to permit a fire-engine, northbound on Minnesota, to pass thru the intersection. After the taxicab had so stopped it was struck in the rear by a motor vehicle owned by defendant Mildred Lane Brownell and driven by defendant Frank E. Brownell.

The above defendants deny negligence.

Defendants Ourisman, Hoff, Pevenstein and Clough admit that they were employees and/or officers of the corporate defendant and deny that they were engaged with defendant Scott in a joint business venture with respect to the operation of Scott's taxicab. Said defendants disclaim any individual responsibility in connection with the operation of the taxicab in question.

2. The above defendants say that any injuries or damages sustained by plaintiffs were caused by the negligence of defendants Brownell in:

1. Following too closely.
2. Failure to have vehicle under control.
3. Failure to give full time and attention.
4. Failure to slow approaching intersection.

/s/ J. Lawrence Hall
Attorney for defendants Regal,
Scott, Ourisman, Pevenstein, Hoff
and Clough

[Filed October 27, 1960]

**PRE-TRIAL STATEMENT OF DEFENDANTS
FRANK AND MILDRED BROWNELL**

These defendants admit the happening of an accident and admit ownership and operation of their vehicle.

They deny all allegations of negligence charged against them and say that if the plaintiffs sustained any injuries, said injuries were caused by the sole negligence or contributory negligence of the co-defendants.

The negligence alleged against the co-defendants includes the following traffic regulations which were violated: Section 38(b), failure to signal intention to stop; 99(c) failing to give full time and attention.

These defendants further say that plaintiff's injuries, if any, were caused by the sudden stopping of the taxicab in which the plaintiffs were riding and were not caused by contact between these defendants automobile and the taxicab.

Stipulations:

1. D.C. Traffic Regulations.
2. These defendants shall have the right to have a physical examination of these plaintiffs if so desired.

SWINGLE AND SWINGLE

By/s/ Allan C. Swingle
Attorneys for Defendants Frank
and Mildred Brownell

* * *

[Certificate of Service]

[Filed October 27, 1960]

PRE-TRIAL PROCEEDINGS

Each of these actions sounds in tort for personal injuries. The parties agree to the consolidation of the actions and have this day accented to a stipulation to effect such consolidation.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF
FACTS:

The P Della Blackwell, then 52, her grandson Raoul Carter, then aged 3, and her granddaughter Yurrisan Carter, then aged 4, were passengers in a taxicab owned and driven by D Scott and bearing the color scheme and insignia of D Regal Cab Co. On April 2, 1956, at 3:30 p.m., when said taxicab was in collision with a motor vehicle owned by Ds Brownell and operated by D Frank Brownell. The collision occurred at or near the intersection of Benning Rd. and Minne. Ave., N.E., Washington, D.C. Both vehicles were traveling east on Benning Rd. approaching Minne. Ave. The taxicab stopped to permit a fire engine, northbound on Minne., to pass thru the intersection. The front end of the Brownell vehicle and the rear of the taxicab were in contact.

Ds Hoff, Pevenstein, and Clough were officers and employees of the corporate D Regal Cab, and Ds Ourisman were directors of such corporate defendant.

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PLAINTIFFS' CONTENTIONS:

Ps claim that the Ds were negligent and violated Traffic Regulations of the D.C. as indicated hereinbelow; that the Ds except for Ds Brownell, Scott, and Regal Cab are sued by Ps in their capacity as officers and employees of D Regal Cab and on the basis that Scott, at the time of the accident, was their agent or employee.

As to Ds Brownell, the following negligence and violation of Traffic Regulations are charged: failure to give full time and attention to operation of vehicle, Sec. 99c; failure to slow down at intersection, Sec. 22c; failure to keep a proper lookout, Sec. 99c; unreasonable speeding under the circumstances, Sec. 22a; following too closely, Sec. 33; colliding with another vehicle, Sec. 54; failure to exercise and due care in entering intersection, Sec. 46, failure to take required action on the approach of an emergency vehicle at intersection, Sec. 50.

As to the other Ds, the following negligence and violation of Traffic Regulations are charged: all of the foregoing specifications of negligence and violations of regulations set out as against the Brownells are charged, except following too closely and in addition, Ps charge these Ds with failure to give a proper warning or signal, Sec. 38b; and as to these Ds, Ps rely on the doctrine of *res ipsa loquitur*.

CONTENTIONS OF DS BROWNELL:

Ds Brownell deny any negligence and assert that if Ps sustained any injury or damage, they were caused by sole or contributory negligence of the co-defendants or their violations of Traffic Regulations in that the taxicab stopped suddenly, without signal or warning and that the injuries were caused by this stopping and not by the contact between the taxicab and the Brownell vehicle; the co-defendants violated Secs. 38b and 99c of the D.C. Traffic Regulations.

CONTENTIONS OF OTHER DEFENDANTS (THAN DS BROWNELL):

Ds deny any negligence and assert that any injuries or damages sustained by Ps were caused by the negligence or violation of D.C. Traffic Regulations by Ds Brownell in following too closely, Sec. 33; failure to have vehicle under control, Sec. 22a; failure to give full time and attention, Sec. 99c; failure to slow at intersection, Sec. 22c.

Ds Ourisman, Hoff, Pevenstein and Clough further deny that they were engaged with D Scott in a joint business venture with respect to the operation of Scott's taxicab and these Ds disclaim any individual responsibility in connection with the operation of the taxicab in question.

INJURIES CLAIMED: AND SPECIAL DAMAGES CLAIMED:

Della Blackwell: cerebral concussion; whip lash injury; aggravation of sub-luxed cervical spine and cervical sprain; low back sprain; injuries to the shoulders and arms with attendant hyperthesia; shortening of the ligaments of the neck; damage to occipital nerves; permanent disability

in terms of shortening of muscles, shortening of ligaments, and recurring attacks of pain in the neck, shoulders and arms; permanent hyperthesia.

Damages: Dr. James Peter Murphy - 35.00; Dr. Robert R. Nelson - 55.00; Freedman's Hospital - 160.00; Dr. Clarence Green - 200.00 (approx.); Dr. Robert J. Gladden - 200.00 (approx.); payments made to Berlina Monk (housekeeper) - 32.80; orthopedic collar - 25.; prescriptions and medicines - 50.00 (approx.).

Yurrisan Carter: whiplash injury; injury to the lower back (lumbar sacral) resulting in loss of appetite and weight; extreme nervousness; traumatic injury to the nerve roots; emotional instability and hysteria; injury to shoulder and arms; post-traumatic headaches; contusions of left shoulder; nausea and vomiting.

Damages: Bette L. Catoe, M.D. - 125.00; Dr. Robert R. Nelson - 39.00.

Raoul D. Carter: loss of upper incisors; hyperactive reflexes; forehead and under left eye have permanent scars; extreme nervousness; cerebral concussion and post-cerebral concussion syndrome; changes in personality; traumatic neurosis; whiplash injury; petite mal seizures.

Damages: Joseph Earle, D.D.S. - 15.00; Dr. Bette L. Catoe - 185.00 (approx.); Dr. Robert R. Nelson - 35.00; Freedman's Hospital - 3.00

- - - - -

STIPULATIONS

The following may be introduced into evidence without formal proof, subject to objections as to relevancy and materiality:

Hospital records

X-ray plates

D.C. Traffic Regulations

D.C. Gov't. plats and plans of highway and street areas
involved in the accident

Records of Fire and Police Dept. of D.C.

The parties agree to the mutual exchange of the names and addresses of witnesses to the accident or the circumstances surrounding same, on or before November 15, 1960.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before Nov. 15, 1960, and a similar exchange of all such reports within 48 hours of the alert of this case for trial.

Counsel for Ps agree to make the Ps available for the purpose of physical examination by physicians of Ds' choice, before, but not to interfere with, trial.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

/s/ John J. Finn
Pretrial Examiner

Attorneys:

/s/ Curtis P. Mitchell	Plaintiffs
/s/ Allan C. Swingle	Ds Brownell
/s/ J. Lawrence Hall	Other defendants than Brownells
/s/ Hugh A.M. Shafer, Jr.	Other defendants than Brownells, & Scott

1 [Filed July 19, 1962]

Washington, D.C.
Monday, November 13, 1961

1-A The above-entitled matters came on for trial before The Honorable
EDWARD A. TAMM, Judge, United States District Court for the District
of Columbia, and a jury at 10:00 a.m.

* * * * *

MR. SHORTER: * * *

14 Mr. Mitchell tells me that in your Chambers, he mentioned Dr.
Barber.

MR. SWINGLE: The end result is the same: he did not comply
with the pretrial order. He knew apparently four months or more ago
that Dr. Barber might participate in this case and the man has been
back here, as I understand it, for four months.

* * * * *

17 THE COURT: I think the Court, Mr. Shorter, must enforce the
pretrial order. If we are not going to do that, we shouldn't have pre-
trials. I do not think I have any option in a situation of this kind but
to say the pretrial order will govern the case.

* * * * *

34 DELLA BLACKWELL

the witness on the stand at adjournment, resumed the witness stand
and testified further as follows:

* * * * *

35 DIRECT EXAMINATION (resumed)

* * * * *

BY MR. MITCHELL:

* * * * *

36 Q. Now, during the course of your ride in the cab, Mrs.
Blackwell, did you have any conversation with the driver? A. Yes, I did.

* * * * *

Q. What, if anything, did you say about his driving and what did
he say about his driving? A. Well, he didn't answer very clearly, but
I asked him if he felt all right and he said yes.

* * * * *

37 Q. What, if anything, did you say to him? A. I told him not to rush too much because we had plenty of time to get home.

Q. Now, then, if you will, Mrs. Blackwell, will you continue to tell us what happened after you left 131 Thomas Street, Northwest, enroute to where you live? A. Well, along Benning Road right after you cross, I presume it is called Eastern Branch or part of the Potomac River, a branch that goes into the Potomac River, when we heard the sirens coming and he pulled in around on -- it's a filling station also a car display place on the Southwest side of Benning Road and he pulled in a little along there for the first fire engine to pass because we had heard sirens coming.

* * * * *

Q. About what hundred block? A. About the 3500 block of Benning Road.

Q. Now then, at this time that you say you heard the sirens, did there come a time when you saw fire engines? A. Oh, yes. He pulled to the side and let the fire engines pass.

38 Q. How many fire engines passed? A. Well, one company passed. We heard the sirens again and he started up, he was going to go out and he stopped again and let the second company pass.

Q. Now, in which direction were these engines travelling?
A. They were travelling east on Benning Road.

* * * * *

40 Q. Now then, what thereafter happened, Mrs. Blackwell?
A. Well, after the second fire department passed, the cab driver then started his car up and he proceeded across the bridge, and we could continually hear sirens because, naturally, they were making quite a bit of noise. They seemed like they continued.

Q. You continued to hear the sirens? A. Yes, I could hear the sirens.

Q. Incidentally, Mrs. Blackwell, as you proceeded across that bridge, were there other cars immediately preceding you? A. No, we were the leading car.

Q. Now, continue if you will, please. A. Well, we proceeded across the bridge and there was a continual blowing of horns from the Fire Department.

Q. Were they horns or sirens? A. Sirens. They were making a noise and they were still going even when we got to Minnesota Avenue. Of course, we stopped there for the light.

Q. When he stopped for the light, Mrs. Blackwell, what color was that light? A. Red.

41

* * * * *

Q. Now, having stopped as you have just indicated, for the red light, then what next occurred? A. Well, he sit there until the light turned amber and then it turned green and he proceeded to cross Minnesota Avenue, and another fire truck was coming up Minnesota Avenue going north.

Q. Now, when did you first become aware, Mrs. Blackwell, that there was another fire engine going north on Minnesota Avenue?

* * * * *

THE WITNESS: Well, we could see them because there is quite a large space there at Minnesota Avenue and Benning Road and --

42

* * * * *

THE WITNESS: It is a wide intersection is what I should have said. There is a wide intersection.

BY MR. MITCHELL:

Q. How far a distance then was the fire engine away at the time you first saw it? A. Oh, there is a filling station on the southeast corner and it had cleared over half the filling station before I realized it was up there.

Q. Had anything made you aware of the oncoming fire engine prior to the time that you saw it? A. Well, we could see it.

Q. My question was: Were you aware of its coming before you saw it? A. Yes, because we heard the sirens.

Q. Were you able to determine the direction from which they were coming? A. Very definitely.

* * * * *

43 A. It was sunshiny, really warm for that time of the year and it was very nice weather.

Q. Now, do you recall, Mrs. Blackwell, whether the windows on the taxicab were up or whether they were open? A. Well, we had the window open because it was rather warm.

Q. Your window was open? A. That is right.

Q. Did you observe whether either or both of the windows on the front, that is in the front portion of the cab, whether they were up or down?

* * * * *

THE WITNESS: The right window in front on the side which I was sitting because the children had preceded me in the car, that window was open.

* * * * *

44 BY MR. MITCHELL:

Q. When you first heard the sirens of these fire vehicles which were travelling north on Minnesota Avenue, was the cab in which you were then riding, was it at a standstill, was it stopped, or was the cab moving? A. When we first heard them, the cab was moving.

* * * * *

45 Q. Now, at the time when you arrived at Minnesota Avenue, Mrs. Blackwell, and you say that the light was red and thereafter the light turned green, at that time, Madam, were you aware of the oncoming fire vehicles travelling north on Minnesota Avenue? A. Yes, because --

Q. Just answer as to whether you were. A. Yes.

Q. Now, tell the court and jury if you will, Mrs. Blackwell, how it was that you were aware of the oncoming fire engines coming north on Minnesota Avenue? A. Well, because the little girl said, "Mama, here comes another one."

Q. Now, then, after she had said that, what then, if anything did you do or see or hear?

* * * * *

46

A. I saw the fire engine coming.

Q. Now, at that time, Mrs. Blackwell, was the taxicab in which you were riding, was it moving or was it at a standstill? A. It started to move.

Q. Now, then, tell us what the condition of the traffic light was as it started to move? A. It was green.

Q. Now, then, going back to a question I asked you earlier, Mrs. Blackwell, how far if you can determine in terms of distance, how far was the fire engine from the taxicab in which you were riding at the time the taxicab started moving and you first saw the fire engine?

Can you point to any object in the courtroom or can you tell us in terms of feet or yards how far away it was in your opinion?

47

A. In my opinion, it was about as far as from where I am sitting to the first bench.

* * * * *

THE COURT: That is 30 feet 2 inches, if you want to know the exact distance.

* * * * *

BY MR. MITCHELL:

Q. Now, Madam, tell us then what you observed, that is, what you saw and what you heard in relation to the taxicab in which you were riding and the fire engines that you saw? A. Well, the cab driver at that particular time, he threw on his brakes.

Q. All right. Now, would you tell us how he did that. Did he do it gradually, slowly, quickly, suddenly, hard or soft?

Tell us. A. He did it very suddenly because he had started to cross the intersection.

Q. All right. Then what happened? A. And, well, when he applied his brakes, then we fell to the floor. Right on top of that, the car behind us rammed us from the back.

48

Q. Tell us, Mrs. Blackwell, if you will, and if you recall, give us your best recollection, how near to the taxicab in which you were

riding as a passenger did the fire engine come? A. Oh, they were coming from -- it wasn't too far away. It was just about to the end of that desk.

* * * * *

THE COURT: That is 5 feet 3 inches, Mr. Mitchell.

BY MR. MITCHELL:

Q. Now, did the fire engine pass in front of the taxicab?

A. Oh, yes.

Q. Now, what, if anything, did the fire engine do? A. He swerved.

* * * * *

MR. SWINGLE: I object, Your Honor.

THE COURT: Your objection is sustained.

BY MR. MITCHELL:

Q. The fire engine swerved. A. Yes.

Q. You saw that? A. Yes.

49 Q. Then did anything further happen, Mrs. Blackwell?

A. The other car rammed us from the back and, of course --

Q. What, if anything, happened to you and what, if anything, did you see and observe happened to the children?

* * * * *

THE WITNESS: We fell forward and the impact from the second car made us go forward again.

* * * * *

BY MR. MITCHELL:

* * * * *

52 Q. Now, did you have any occasion to examine the damage to these vehicles? A. Oh, no, I didn't examine the vehicles.

Q. Incidentally, Mrs. Blackwell, at the time the cab was at the stop light at Minnesota Avenue and when the stop light had changed from red to green and the car proceeded and then thereafter stopped suddenly, as you say, did you observe the cab driver give any indication either by signal device or manually that he was going to stop? A. No, it was done very suddenly.

* * * * *

93

CROSS EXAMINATION

BY MR. SWINGLE:

* * * * *

98

Q. All right. Now, where was the car that you were in when you first observed the northbound engine? A. You mean going up Minnesota Avenue?

Q. Yes. A. We were the first car right there at the end of the viaduct to make the cross.

Q. At the end of the viaduct? A. Yes.

Q. Where is the end of the viaduct with relation to the intersection of Benning and Minnesota Avenue? A. Well, it all depends upon which end you want. One end starts at Minnesota Avenue and the other end starts down at about 34th Street.

99

Q. All right. So that the east end of it is at the intersection of Benning and Minnesota Avenue; is that correct? A. That is right.

Q. And at that time, the vehicle that you were in was standing still? A. Yes.

Q. At that time, the traffic light controlling eastbound traffic was red? A. When we stopped there, it was red.

Q. How long had you been at a standstill before you observed the northbound fire engine? A. I really don't know.

I did not have a watch on.

Q. Do you have any idea as to the length of time? A. No.

* * * * *

110

Q. When you first saw the northbound fire engine on Minnesota Avenue, where was the front of that engine with respect to the southern edge of the intersection? A. It was right about there (indicating), as I tried to explain it.

Q. In feet, yards, blocks or miles, how far away was it?

A. I really don't know how many feet or yards.

111

Q. Can you point it out either in the courtroom or whether it was longer than the length of the courtroom that the engine was from the intersection? A. It couldn't possibly have been as long as the courtroom.

Q. It would not be that long? A. No.

Q. How long would it be? Can you point out something in here as to how far it would be? A. When I first saw it, it was on the other side of the street; on the other side of Minnesota Avenue, coming up, and it was just about that distance from here to that first chair there.

* * * * *

[Filed July 19, 1962]

113

Washington, D.C.
Tuesday, November 14, 1961

* * * * *

116

CROSS EXAMINATION (resumed)

BY MR. SWINGLE:

* * * * *

117

Q. I am trying to find out the width of the roadway. Can you tell me how many automobiles you could place side by side from one curb to the other on Minnesota Avenue?

* * * * *

A. Yes.

118

Q. How far into the intersection did the front of the taxicab go before he applied his brakes? A. I don't know.

* * * * *

Q. Can you say with respect to whether it was a third of the way into it or half of the way or more than half? A. It was almost half the way.

* * * * *

Q. All right. And where was the cab in the intersection when the accident between the cab and Mr. Brownell's car occurred?

A. Right there where he stopped.

Q. So when he stopped, where was the front of his car when it was hit?

* * * * *

A. It was on Benning Road.

Q. Had he crossed over halfway the width of Minnesota Avenue?

A. Just about.

* * * *

Q. * * *

119

When the stop occurred, as I understood you, it was a sudden stop; is that correct? A. Yes.

Q. And it was so sudden that the two children were thrown to the floor; is that correct? A. That is right.

Q. And at the time the boy was sitting on your lap, is that right? A. Yes.

Q. Isn't it a fact that before the impact of the Brownell car occurred, that you were in the process then of picking the boy up off the floor? A. Certainly.

Q. Now, was Yurrissan, the little girl, standing or sitting down before the cab came to a stop? A. She was sitting.

Q. Was your position as the impact of the Brownell car occurred in a leaned over position in the process of trying to get the boy up?

A. Yes.

* * * *

140

CROSS EXAMINATION

BY MR. HOELZER:

Q. Mrs. Blackwell, a few questions concerning yourself again, back to the accident itself: Now, you have told us that there was a sudden stop of the taxicab and an impact by the car driven by Mr. Brownell. Can you separate those accidents? In other words, in time or what caused what injuries, or did it all happen at once, or what? A. No.

141

Q. Your answer is no? A. I cannot separate them and I cannot tell you which injuries happened at the time. I know we were all injured.

Q. Was it all very sudden, the stop and the impact, or what?

A. Yes.

Q. How sudden?

Like that (indicating clap clap)? Or what? A. Well, suddenly is what I think it is, it is very quick.

* * * *

151

CHARLIE C. SCOTT

called as an adverse witness on behalf of the Plaintiffs, having first been duly sworn, took the witness stand, was examined and testified as follows:

152

DIRECT EXAMINATION

BY MR. MITCHELL:

Q. Would you state your full name to the Court, sir?

A. Charlie Curtis Scott.

* * * * *

Q. Where are you employed? A. I drives a taxicab.

* * * * *

165

Q. Now, in going across this bridge, sir, were you leading the traffic? A. In going across this bridge--we went across this bridge--to my recollection, I was leading the traffic, yes.

* * * * *

167

Q. When you got to Benning Road and Minnesota Avenue, did you look at that time--did you stop sir? A. When we got to Minnesota Avenue and Benning Road--from my recollection, we stopped before we got there and started with the green light.

Q. Stopped for the green light? A. Started on the green light.

Q. At that time, sir, did you look in your mirror or did you turn or did you engage in any process whatsoever to determine whether there was a car approaching you from the rear? A. I explained to you that I did not look in the mirror. Why ask the question again?

Q. When is the first time you saw Mr. Brownell's car?

A. After it hit the car.

Q. What were you doing--what was your car doing at the time it was struck by Mr. Brownell's car? A. It had stopped.

168

Q. You were at a dead stop? A. It had come to a stop. Not a dead stop, no; stopped just like you pull over and have to stop.

Q. You were just barely moving, is that what you mean?

A. Not barely moving, no; you pulls off and you stop.

Q. Well, now, had you stopped suddenly? A. You know how you would stop--

THE COURT: No. Answer the question. Did you stop suddenly?

THE WITNESS: Some suddenly.

BY MR. MITCHELL:

Q. Why? A. The fire department.

Q. Tell us about the fire department. A. Coming up to Benning Road and Minnesota Avenue, we observed the fire department come back. Those buildings are there. You cannot see down the street. You would hear the fire department before you see it coming down the street. You cannot see down the street. This fire department was coming by and I had started to cross the street and I stopped, just come to a stop at this intersection. I had crossed the crosswalk when I stopped.

THE COURT: Are you finished?

THE WITNESS: Yes.

* * * * *

170

BY MR. MITCHELL:

Q. Where were the fire engines or where was the fire engine and where were you at the time you say you heard them and you saw them simultaneously? A. It was--you know, the buildings hide them. At that time when I seen the fire engines, they were coming up to the intersection of Benning Road and Minnesota Avenue. It was coming up to the intersection of Benning Road and Minnesota Avenue. It went just straight through.

171

Q. It went straight through? A. Yes.

Q. Did you go straight through at the time when you approached this intersection? A. No, sir, I stopped.

Q. Did you stop for the red light? A. I was starting across, as I told you, -- we had a green light and I had made my start across the street and the fire department come up and that's when I stopped.

* * * * *

174

THE COURT: What page of the deposition are you referring to?

MR. MITCHELL: Page 7, Your Honor.

* * * * *

BY MR. MITCHELL:

Q. Mr. Witness, I will ask you if the following questions were asked of you and if you gave the following answers:

"Question: When you approached the intersection of Benning Road and Minnesota Avenue, Northeast, travelling east on Benning Road, what was the condition of the traffic light for your approach to that intersection?

"Answer: In approaching that intersection, the traffic light was green. I could see it green when I was approaching.

175

"Question: Well, can you tell me in your own words how the accident occurred?

"Answer: Well, we were approaching the intersection on Benning Road and about before we got to the intersection, the fire department came across. We heard the fire department before I seen it so that gave me plenty of time to stop so I came to a complete stop."

Now, I will ask you, Mr. Scott, if those questions were asked and if you gave those answers? A. The questions was asked me and I gave those answers.

Q. Then, it is a fact, is it not, Mr. Scott that before you got to that intersection, the light was green? A. Yea, the light was green.

* * * * *

176

Q. Let me ask you this question, Mr. Scott: Did you previously testify, sir, that you had crossed the crosswalk at the time your car was struck? A. I have not testified I crossed the crosswalk; if they put it down that way, they put it down wrong. I said that my car was across the crosswalk when I testified.

Q. Now then, tell me, sir, immediately prior to the time that your automobile was struck, did you give any signal to Mr. Brownell that you were about to stop your vehicle? A. Not as I know of. It

was not a stop that you could come to all that, to say you give somebody a signal; it was a stop for a fire department. It was a stop like anybody else would stop. I might have--

* * * * *

179 Q. Then, at the time, sir, that you made this sudden stop in appreciation of this oncoming fire engine, was your foot on your brakes?
A. Yes, my foot was on my brakes.

Q. Now, then, how soon after that when you made that sudden stop was it that you were struck from the rear by the automobile which
180 was operated by Mr. Brownell? A. It was a few seconds; it was a few seconds after that before I was struck.

* * * * *

183 Q. Tell us, now, sir, how far you were from the intersection as you stated it, sir, that you realized the light was green and you were going 10 or 15 miles an hour? A. 15 miles an hour.

Q. 15 miles an hour. How far were you from the intersection when you were going 15 miles an hour? A. About from here to the door.

Q. Now, could you see at that time, sir, south on Minnesota Avenue and north on Minnesota Avenue?

* * * * *

A. I can't answer that question. The buildings block your view on Minnesota Avenue.

* * * * *

185 Q. You didn't finish, sir. Are you talking about the buildings being there? A. I say you have to be in the intersection to see south on Minnesota Avenue.

Q. And you started to say because of what? A. Why?

Q. Yes, sir. A. It is a little tavern there that blocks you and the buildings blocks you.

* * * * *

Q. Now, immediately after this impact, immediately after you made the stop, the sudden stop you had to make on account of the fire

engines, did you become aware, sir, were you aware of what had occurred and what had happened to your passengers? A. I was aware.

* * * * *

224

FRANK E. BROWNELL

called as an adverse witness on behalf of the plaintiff, having first been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MITCHELL:

* * * * *

226

Q. Now, on this date, sir, did you have occasion to be in the vicinity of Benning Road and Minnesota Avenue, Northeast, Washington, D. C.? A. Yes, I did.

* * * * *

Q. Now, did you have occasion to see or hear any fire engines?
A. Yes, I did.

Q. And in which direction were these fire engines going?

227

A. They were travelling east on Benning Road.

Q. Did they pass you? A. Yes, they did.

Q. Do you recall at this time, Mr. Brownell, where you were when the fire engines passed you? A. Yes, we were on the bridge.

Q. Do you recall at that time, Mr. Brownell, whether you saw this car which was being operated by Mr. Scott? A. I was aware of a car in front of me. I didn't know it was his car.

* * * * *

Q. Were you immediately behind this car? A. Yes.

* * * * *

231

A. The light turned green and we proceeded going down the hill until we got near the intersection or I got near the intersection.

Q. Now, did you observe some of these cars, sir, that were in front of you, did you observe them going across Minnesota Avenue?

A. Across Minnesota, yes.

Q. How many cars would you say crossed Minnesota Avenue?

A. Five or six.

Q. Where were you, sir, when you first observed the light was green as you approached Minnesota Avenue? A. When we started to move.

Q. Well, in terms of the intersection, then, about what distance would you say you were away in terms of yards? A. About 150 feet.

Q. Now, did that light continue or remain green, sir, until such time as you reached Minnesota Avenue or near the intersection thereof?

232 A. Yes, it did.

Q. Now, then, sir, then what thereafter happened? A. Well, the car in front of me stopped suddenly. His back end came up and my front end went down and we stopped.

Q. How fast were you travelling when you were going across the bridge and you saw the street light? A. I guess I was going about 10 or 12 miles an hour.

Q. Was that the approximate speed of the line of traffic in which you were travelling? A. That is right.

Q. Now, this car that was immediately in front of you, did this car give you any signal or indication that he was going to stop? A. No.

Q. Now, how far a distance would you say, sir that you were behind this car at the time you first appreciated the car was going to stop? A. About 7 or 8 feet.

Q. Had you maintained that distance in your relationship with this car as you had proceeded across the bridge? A. About that.

* * * * *

233 Q. Now, did there come a time that you saw an emergency or fire vehicle on Minnesota Avenue? A. About the time of the accident.

Q. Well, when you say "about the time", had you heard or seen the fire engine prior to the time that you struck this vehicle which preceded you? A. No.

Q. Now, this car that stopped in front of you, sir, at the time this car stopped suddenly in front of you, what was the condition of the light controlling traffic going east on Benning Road across the intersection of Minnesota Avenue? A. Green.

* * * * *

234 Q. Now, did there come a time that you appreciated the presence of fire apparatus? A. Yes.

Q. And how soon was that after you had struck this vehicle which was in front of you? A. Just about the same time as the accident I heard sirens.

* * * * *

235 Q. Then is it fair to say, Mr. Witness, that the fire vehicle came across in front of the vehicle which preceded you after you had run into the rear of this vehicle? A. That is correct.

Q. At the time, sir, that this vehicle stopped suddenly in front of you, how fast was that vehicle going in your best estimation?

* * * * *

MR. MITCHELL: How fast had it been going is what I meant to say. Thank you, Your Honor.

THE WITNESS: About the same speed I was, 10 or 12 miles an hour.

* * * * *

237

CROSS EXAMINATION

BY MR. HOELZER:

* * * * *

239

A. After the fire engines had passed, we proceeded on over the bridge until the first car in the line of traffic stopped for the stop light.

* * * * *

240

Q. To the best of your recollection did that taxicab come to a stop which was involved in the accident? A. That is right.

Q. And to the best of your recollection, how many cars were stopped for the same light in front of the taxicab? A. About seven or eight cars.

Q. Now, what has happened to those fire engines that had passed you? A. They were gone.

Q. Could you hear them off in the distance? A. No.

Q. Did this light that you had stopped for at this intersection

where the accident happened--it turned green, you testified, is that correct? A. Yes.

Q. Now, what happened to the cars in front of the taxicab when that light turned green? A. They went through the intersection.

Q. And now, to the best of your recollection, did you ever hear this fire engine that was coming north on Minnesota Avenue up until just about the second before the accident? A. No, sir.

241 Q. Would you state to us that this siren did not sound, based on the fact that you couldn't hear it? A. No, it didn't.

Q. It did not make any sound? A. No.

Q. Now, the cars ahead of the taxicab went through the intersection; is that correct? A. That is correct.

Q. You had generated your speed up to approximately what speed? A. About 12 miles an hour.

Q. Was this also true of the taxicab? A. That is correct.

Q. And the taxicab at that time was directly in front of you? A. That is right.

Q. And you were approximately 7 to 8 feet in back of the taxicab? A. That is about right.

* * * * *

244 Q. In that period of time, did you then see this fire engine going north on Minnesota Avenue? A. At that time the fire engine was about

245 20 or maybe 25 feet on the south side of Benning Road.

Q. And you had not seen it because of the building; is that correct? A. That is correct.

Q. If this taxicab had gone across the street, do you know if the fire engine and the taxicab would have been in a terrible accident or not? A. It would have had to be.

Q. It had to be.

* * * * *

266 THE COURT: * * *

The Court has admitted Sections 22(a), 33, 39(c), 50(a) 1 and 99 (c).

* * * * *

[Filed July 19, 1962]

289

Washington, D. C.
Wednesday, Nov. 15, 1961

The above-entitled matters came on for further trial before The Honorable EDWARD A. TAMM, Judge, United States District Court 289-A for the District of Columbia, and a jury at 10:00 am.

* * * * *

329 THE COURT: The Court has admitted in evidence certain traffic regulations that were in force and effect on the date of this accident, ladies and gentlemen of the jury. Mr. Mitchell will read those regulations to you now.

* * * * *

330 MR. MITCHELL: [Section] 22(a).

THE COURT: Very well.

MR. MITCHELL: (Reading)

"No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions, and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicles or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care."

Now, I will read Number 33, Your Honor. (Reading)

"Section 33 - Following Too Closely. The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Number 39(c): (Reading)

"Turning Movements and Required Signals. No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is an opportunity to give such signal."

331

50(a)(1): (Reading)

"Operation of Vehicles and Streetcars on Approach of Authorized Emergency Vehicles. The driver --"

I'm sorry, if Your Honor please.

"(a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of Section 131.1 of these regulations, or of a police vehicle properly and lawfully making use of an audible signal only:

"(1) The driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer."

99(c) (Reading):

"Obstruction to Driver's View or Driving Mechanism. An operator shall, when operating a vehicle, give his full time and attention to the operation of same."

That concludes the reading.

* * * * *

345

[Out of Presence of Jury]

THE COURT: Mr. Swingle.

MR. SWINGLE: I would like to make a motion with regard to my client. I move for a directed verdict with respect to this case on the grounds that I do not feel that any negligence has been shown on the part of Mr. Brownell, and that, if anything, this was, as the evidence has been adduced here today, at least an unavoidable occurrence such as to, I think, allow the Court to direct a verdict in their favor.

THE COURT: Do you have anything more?

MR. SWINGLE: I believe that's all, Your Honor.

* * * * *

346 MR. HOELZER: On behalf of the defendant Taxicab Regal, the Taxicab Association, and the driver, Mr. Scott, I make a motion for a directed verdict on the grounds that a case has not been made out against those defendants.

* * * * *

MR. MITCHELL: If it please Your Honor, I will be very brief about this. I think the position taken by each counsel with respect to their respective defendants certainly is untenable, and I might also say, Your Honor, in addition to that fact the observation that nowhere in the pleadings have we found any suggestion initially, or any time up to pre-trial, that there was an unavoidable accident and this is a special plea which has to be affirmatively offered. But further I say, if Your Honor please, that there certainly is no evidence supportive of that contention. I respectfully submit that the evidence clearly shows that Mr. Swingle's client did run into the rear of this other automobile, by his own testimony, the number of feet, seven feet I think he estimated that he was traveling behind this vehicle. He was traveling, according to him, about twelve miles an hour. According to Mr. Scott they were moving in the neighborhood of about fifteen miles an hour.

347 I think the total picture, the total circumstances, the facts and circumstances of this situation, if Your Honor please, have lent themselves conclusively to the position, the necessary posture, I say, to this unavoidable conclusion that they are both in, as I see it, and therefore I respectfully move, Your Honor, that the motion made by them respectively be denied.

THE COURT: Is there anything more, Mr. Swingle?

MR. SWINGLE: With respect to the unavoidable accident theory I move the Court to allow that additional theory to be included as the defense on behalf of the defendant Brownell under the rules -- I have forgotten which number it is -- but the rules to provide for it where the evidence produces such facts as would accommodate such a defense.

THE COURT: Do you have anything with reference to this motion?

MR. MITCHELL: To the motion -- is he now making a motion to

ask Your Honor to allow him to include a defense of unavoidable accident?

THE COURT: That was the motion. That is the motion.

MR. MITCHELL: Well, if that be the motion, if Your Honor please, I would merely repeat what I said to Your Honor initially. I do not think the facts and circumstances lend themselves to the application of it, and again I urge upon Your Honor that it certainly comes late now at this
348 juncture to urge the Court to allow him to interpose the defense of unavoidable accident.

THE COURT: I think the Court is required by the Court of Appeals ruling to permit this amendment in the pleadings. It is hard for me to reconcile the application of this rule to the principle that the pretrial proceedings govern the trial of the case, and yet our Court of Appeals said, as you gentlemen all recall in Judge McGuire's wrongful death case, Hord versus the Homeopathic Hospital, as I recall it, that it is an abuse of discretion for the trial judge not to permit amendments of pleadings even after all of the evidence is in.

The Court will grant the motion to permit the defendants to amend their pleadings to add the defense of unavoidable accident. The Court is required by the Court of Appeals rules to inquire of the opposing counsel when such an amendment is granted whether it will require any additional time for the preparation of their case to meet the new matter brought in by the amended pleading.

MR. MITCHELL: No, if Your Honor please.

THE COURT: The Court will then deny the motions of all defendants for a directed verdict. I believe that the testimony fundamentally of the plaintiff, Della Blackwell, creates questions of fact upon which the jury
349 must pass to determine whether, if her testimony is accepted, the conduct of the defendants was in fact negligent. The Court does not pass upon the credibility of the plaintiff, Della Blackwell, as a witness. This is a responsibility of the jury. The Court will deny both motions.

MR. SWINGLE: May I -- excuse me.

MR. HOELZER: May I, for the sake of the record, Your Honor, the amended pleading of unavoidable accident also goes to my defendants,

Mr. Scott and the Regal Cabs -- is that right, sir?

THE COURT: Very well. I used the plural in permitting the defendants. It will embrace all defendants, all present defendants in the case.

* * * * *

350

(AT THE BENCH:)

MR. MITCHELL: On behalf of the plaintiff we wish at this time to ask Your Honor to enter a judgment for the plaintiff on the issue of liability. We feel, if it please the Court, that the facts in this situation, particularly in respect of the defendant Scott, are of such character as lend themselves conclusively to the demonstration beyond question of fact for the jury that Scott was negligent. We also contend, if Your Honor please, that the facts as adduced in the case thus far on the part of the plaintiff from the testimony of the defendants themselves, corroborated by the testimony of the plaintiff, that the defendant Brownell was also conclusively negligent, by his own testimony, and as I say corroborated by the testimony of the plaintiff and the defendant Scott. Scott testified, if Your Honor please, that at the time that he was struck from the rear by the defendant Brownell that his car was at a complete stop. Your Honor will recall that the defendant Brownell testified that at the time that he struck this vehicle he neither saw nor heard the fire engines, whereas all other witnesses testified, even Mr. Scott who had previously testified he did not hear nor did he see or recollect hearing or seeing any fire engines on any road, that he did hear the fire engines at Minnesota Avenue and Benning Road, that is, the intersection there, before he saw

351 the intersection, before he saw the fire engines or the apparatus, and therefore we say, if Your Honor please, that the circumstances are of such a conclusive character that the fire engines were there is beyond question, conceded and admitted by all persons, that if they were there, and if the sirens were blowing, then both of these drivers should have, had they been giving full time and attention to the operation of the vehicle -- we say this is conclusive -- should have anticipated or should have taken precautionary measures of such character as would have avoided

this accident. Therefore we believe at this posture of the situation, at this juncture, we are entitled to a directed verdict on the issue of liability.

THE COURT: I think the question of liability, as it is presented by the evidence to this point, creates a factual question for the jury because of variations between the testimony of Mr. Scott, Mr. Brownell and Della Blackwell. The Court will deny the motion.

451 [Filed July 19, 1962]

Washington, D.C.
Thursday, Nov. 16, 1961

454 MR. SWINGLE: I was told by Miss Lyddane that perhaps an order should be prepared on that amendment to the pretrial and I have it there. However, in discussing it, I showed it to Mr. Mitchell and he brought to my attention that perhaps the words "unavoidable accident" are not clear as "imminent peril" might be and with that thought --

THE COURT: Is that the phraseology that you want to use?

MR. SWINGLE: Or "sudden emergency", Your Honor.

THE COURT: I will assume for the record that you renew the objections that you had to the amendment of the pleadings, Mr. Mitchell.

MR. MITCHELL: Yes, Your Honor.

THE COURT: But as to the form of the order, you have no objection?

MR. MITCHELL: None, whatever pleases Your Honor.

THE COURT: The Court has signed the order.

500 MR. MITCHELL: May I at this time on behalf of the plaintiffs, Your Honor, renew our request that the Court direct a verdict as to the issue of liability?

THE COURT: The record will indicate a renewal of your motion and the Court's denial of the motion.

516 THE COURT: I do not find the plaintiffs' instruction No. 9 and

defendants Brownell's Instruction No. 9 incompatible. Plaintiffs' instruction relates to a general duty, a primary duty. I think the Brownells' instruction No. 9 enlarges upon a description of items which may or may not constitute reasonable care.

The Court will grant both of these instructions.

* * * * *

531 THE COURT: * * *

Is there any objection to defendants Brownell's requested instruction No. 8? I will preface this inquiry by saying that the Court assumes and the record will indicate that counsel does not waive any position or renounce any position previously taken upon this matter of imminent danger.

* * * * *

534 THE COURT: The Court will grant the defendants Brownell's requested instruction No. 8.

* * * * *

575 MR. SWINGLE: * * *

I say to you that in today's traffic that ten feet behind at ten miles an hour or at twelve miles an hour, which I think everyone must admit is their best estimate, under the circumstances the night or the afternoon of this occurrence is not a negligent condition, is not negligent operation of a car. Both Mr. Scott and Mr. Brownell, I believe, are united in the thought that this was the result of an unavoidable, a sudden condition which was not brought on by any negligence on their part.

* * * * *

MR. HOELZER: * * *

586 I say to you this was an emergency. Just because there was an accident doesn't mean there was negligence on the part of the automobile drivers. This was an unavoidable accident. Mr. Scott did what he should have done.

The issue you have to decide is whether the siren sounded before the taxicab started into the intersection is a true statement and like

See p. 79

other statements of Mrs. Blackwell as against the statement of these two drivers. If you believe the fire engine did not sound its siren, if you believe that, then this was an unavoidable accident and nothing could have prevented it.

* * * * *

590

CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, it now becomes the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

I recognize that this is rather late in the afternoon to begin a charge to a jury, but I have a special calendar set up tomorrow of a number of contested motions. If I waited until tomorrow to perform my duties in this case, I do not know whether to tell you to come in at 12:00 o'clock or 2:00 o'clock or 3:00 o'clock. In other words, I don't know what time I will finish. I am reluctant to put these instructions over until Monday because I would not want that much time to intervene between the Court's charge and the closing arguments. Consequently, I am going to instruct you as to the law that will govern you this afternoon. I will do it as briefly as possible and in the event you do not reach a verdict in the case this afternoon -- and I frankly do not expect you to -- you will be excused at approximately 5:00 o'clock until tomorrow morning when you will return to the courthouse and continue your deliberations.

591

From the show of hands which the Court observed in answer to its inquiry as to how many of you had actually participated in the trial of a case, I assume that for some of you this is your first experience in having to sit in judgment upon the conduct of your fellow man.

Actually, the responsibilities that confront you at this time are very serious ones because you are called upon to be the judges of the facts. Our Anglo-American system of jurisprudence operates on a two-pronged approach to these cases in which the Court is the judge of the law, the jurors are the judges of the facts. It now becomes your

responsibility under the Court's instructions to retire to the jury room and to render a verdict in this case.

The word "verdict" I think emphasizes, by its connotation, the responsibilities which are placed upon you. The word "verdict" is composed of two Latin words: the first syllable "ver" comes from the word "veritas", meaning truth; the final syllable "dict" comes from the Latin verb "dicto", meaning to speak. So that when you return to the courtroom, you are, in the eyes of the law, speaking the truth as to the rights and responsibilities of the parties to this litigation.

592 I want to point out to you first of all that the closing arguments made by the attorneys do not constitute evidence in the case. The closing arguments are the efforts on the part of advocates, admittedly with a partisan viewpoint, attempting to place before you the evidence in the light that is most favorable to the clients which they represent.

The recollection of the attorneys as to the evidence in the case is not binding upon you; nor, if in the course of this charge to you the Court has occasion to refer to any of the evidence, is the Court's recollection of the evidence binding upon you. It is your recollection, your recollection alone which must guide you in reaching your verdict in this case. I repeat, you are the judges of the facts.

In this regard, you may be interested to know that the Court has the right, if it sees fit, to express the Court's views as to the facts in the case. I have a right as a Federal judge to tell you what witnesses I believe, what witnesses, if any, I do not believe. I have the right to tell you what facts that I believe have or have not been established by the evidence. This prerogative is conditioned only upon the requirement that in making these statements to you I say that, of course, you must not be influenced by what I say to you about the facts in the case. As I have said to other juries, I think it is somewhat hypocritical for a judge to sit
593 in front of a jury and tell them his impression of the case and then say, "Of course, you must not be influenced by what I think about the case." I never can understand why he tells the jurors what he thinks if he doesn't assume that they are going to be influenced in some regard.

Consequently, I say to you that in the course of this charge, I will scrupulously avoid giving any personal views about the evidence in the case.

It is your function and your responsibility to resolve the evidence and to arrive at what we call the ultimate or final facts and then apply the law as it is outlined to you by the court to those facts and to do justice between these parties.

We have before you at this time for practical purposes three cases against four defendants. The three cases were filed as three cases. They were consolidated under our administrative practice for the purpose of trial; but actually in this case, the plaintiff Della Blackwell sues these four defendants in her own right for injuries which she says she sustained. She also sues these defendants in two other cases: One in which she says she is the next friend of a minor Yurrisan Carter. So that she brings an action in her own name but in the rights of the child, the little girl.

594 Also she brings a third action in her own name but as the next friend of the child, the boy Raould Carter. So that you have three cases before you.

When you return to the courtroom, in a procedure that I will outline to you shortly, the Clerk is going to ask you for your verdict in each of the three cases.

The grandmother, I repeat, sues in her own right, and she sues in her name but in behalf of each of the two children.

There are four defendants in the case: Mr. and Mrs. Brownell constitute two defendants. Their legal status before you in all of your considerations is identical because under the District of Columbia Code, the owner of an automobile is liable for anything that happens when the car is driven with his or her consent. Similarly, under our District of Columbia law, the defendant Mr. Scott and the taxicab company are, for practical purposes, one and the same before you because the acts, under our decisions, of one are the acts of the other.

You are instructed that although there are three plaintiffs in this action, the case of each is separate from and independent from that of

595 the two others. The law permits them to join as plaintiffs when their claims involve the same subject matter. However, their rights, if any, are separate, not joined. The instructions I give you apply equally to each plaintiff unless otherwise stated and you will determine each plaintiff's case independently and as a separate action, and return a separate verdict in each case for the plaintiff or the defendant.

While there are four defendants in this action, it does not follow from that fact alone that if one is liable, all are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the others. The instructions I have given you govern the cases as to each defendant to the same effect as if he were the only defendant in the action and regardless of whether I refer to the defendant in the singular or use the plural form.

If you find none of the defendants to be liable, your verdict should be for all of the defendants.

If you should find the plaintiffs are entitled to recover but not against all defendants, then your verdict in favor of the plaintiffs should be rendered only against the defendants you find to be liable. If you should find that the plaintiffs are entitled to recover against all of the
596 defendants, you may not allocate or prorate the damages among them, but you must deliver a verdict in one single sum against all of the defendants whom you find to be liable.

The number of defendants you may find to be liable should not influence the amount of your verdict. You must determine what amount will fairly and reasonably compensate the plaintiffs for their injuries and damages if you find for a plaintiff or plaintiffs.

You should then return a verdict in that amount against such defendant or defendants.

In reaching your verdict in the case, you must consider the evidence which has been offered in open court without prejudice, without bias, without sympathy towards one side or the other.

As jurors, you are the sole judges of the facts. As jurors you are

the sole judges of the credibility of the witnesses. This means that you must determine which of the witnesses you will believe and to what extent you will believe them.

In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to consider the
 597 demeanor of that witness on the witness stand, his or her manner of testifying, his or her ability to recall the facts and the circumstances about which the witness testified, the witness' apparent frankness or lack of frankness, their bias or prejudice, if any is manifest, their interest in the outcome of the case, if any. You may consider all of the elements that you have found in the course of your life to be important in determining whether people are telling the truth or are telling a falsehood.

You may consider whether the witness has on any occasion made conflicting statements, that is, statements which are in conflict with the testimony which the witness today or this week has given from the witness stand.

You are instructed that interest in those things involved in the controversy or its results, the friendship, the relationship or animosity towards persons concerned therein and many other human factors may or may not affect the desire or the capacity of a witness to tell the truth, depending upon his or her character. You will, therefore, give to the testimony of each witness such weight as in your judgment it is entitled to receive when tested by all these considerations and in the light of all of the other evidence in the case.

In weighing the testimony of the witnesses, it is proper for you to
 598 consider those factors of human nature which either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. These factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and the purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that a witness had a motive for favoring or an inclination to favor any party? In other words, was he a biased or an impartial witness? What degree

of intelligence, what quality of memory and what grade of moral purpose, so far as concerns this case, were revealed by the witness' appearance, his manner of testifying and all of these other elements in the case?

Was the testimony of each witness reasonable and consistent within itself and with uncontradicted facts?

Should you consider any of these questions, either in your own private reasoning or in open discussion, you must look for an answer only to the evidence received in the trial of the case.

In determining the weight that you should give to any evidence presented to you, you may use your everyday experience and good sense,
599 the good sense which you have gained through the conducting of your own affairs.

If you find that any witness wilfully testified falsely as to any material fact concerning which the witness could not possibly be mistaken, you are then at liberty if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

You are not to be influenced by the number of witnesses who have testified for one party or the other. Obviously, you cannot mechanically count the number of witnesses that appear for each party and award your verdict to the litigant producing the largest number of witnesses. I am sure you will appreciate from your experience in this case alone that if we permitted that procedure, no trial would ever end; each party would produce an endless number of witnesses. Consequently, I say to you that you must weigh the testimony of the witnesses rather than to numerically count them. You should not arbitrarily disregard the testimony of any witness.

You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary if upon the
600 whole case and considering the credibility of the witnesses, as I have defined that term to you, you should determine that the probability of truth favors the testimony of that one witness.

In the course of this trial, you have heard a substantial amount of testimony from professional men, general doctors whom the Court has recognized as expert witnesses. It is a general rule of evidence that a witness may not express an opinion about any facts. An exception to this rule is recognized in the case of expert witnesses in the field of their expertise.

Consequently, when the Court is satisfied that a man is an expert in a field in which the majority of the jurors and the Court do not possess expert knowledge, the Court permits that witness to express opinions in the field of his specialty. These various doctors have expressed opinions to you.

The rule is, however, that the jury is not bound to accept the testimony of an expert witness. The reason for the rule is that if you jurors were bound by the opinions of these expert witnesses, the expert witnesses would be, as a practical matter, making findings of fact. You are the persons who must make the findings of fact; consequently, you are not
601 bound to accept the opinions of the expert witnesses.

You should not arbitrarily disregard the testimony of any expert witness. You should consider his training, his background, the reasons upon which he based his opinion and you should give to his testimony such weight as in your opinion it is properly entitled to receive.

In this case, there has been a conflict in the testimony of the expert witnesses. By considering and weighing the credibility and qualifications of the various experts who have testified, the logic of the reasons given in support of their opinions, the other evidence in the case which favors or opposes a given opinion, and by using your own experience and good judgment as reasonable and intelligent people, you must resolve the conflict of testimony between the expert witnesses and determine which of the opinions to accept as accurate.

It is your responsibility in this case to resolve any conflicts of evidence.

The burden of proof is upon the plaintiffs to sustain their aspect of the case by what we call a fair preponderance of the evidence.

I don't know how many of you have sat in criminal cases. If any of you have been jurors in a criminal case, you have heard the Court
602 tell you that the Government must prove its case beyond a reasonable doubt. This is a very heavy burden of proof. It does not exist in civil cases. These plaintiffs, I repeat, are charged with proving their case by a preponderance of the evidence. What does that mean?

The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it has the more convincing force.

A party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the other side and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

The burden of proof, then, is upon these plaintiffs to prove by a preponderance of the evidence that these defendants were negligent and that such negligence was the proximate cause of the injury to the plaintiffs.

If the plaintiffs fulfill this burden, they are entitled to recover from all of the defendants if you find that all of the defendants were negligent and that their negligence was the proximate cause of the plaintiffs' injuries.

603 If the plaintiffs sustain their burden of proof against one defendant and not against the others, you should return a verdict only against that or those defendants for the amount of damages which you will award to the plaintiffs under the instructions which I will give you very shortly.

The law does not permit you to guess or to speculate as to the cause of this accident. If the evidence is equally balanced on the issue of negligence or proximate cause so that it does not preponderate in favor of the party making the charge, that is, the plaintiffs, then the plaintiffs have failed to fulfill their burden of proof.

I have mentioned negligence so naturally the question comes to mind "what is negligence?" In the eyes of the law, negligence is the doing of some act which a reasonably prudent person would not do or failure to do an act which a reasonably prudent person would do

actuated by those considerations which ordinarily regulate the conduct of human affairs. Negligence is the failure to use ordinary care in the management of ones property or one's person.

You readily appreciate, I am sure, that negligence is not an absolute term but is a relative one. The conduct in question must be considered in the light of all of the circumstances. Obviously, what is

604 negligence under one set of conditions might not be negligence under another set of conditions.

The standard, then, that the law sets up for all of us to obey is the standard of the conduct of a man of ordinary prudence under similar circumstances. The law does not require of anyone a standard of conduct equal to that of a person of extraordinary skill or ability or an exceptionally conscientious person, but rather that standard, I repeat, of the conduct which an ordinary prudent man exercises in order to avoid harm to himself or others. The amount of care or caution varies with the circumstances. It varies in proportion to the danger known to be involved in a particular situation.

This means that in deciding whether there was negligence in this case, the conduct of each defendant must be considered in the light of all of the surrounding circumstances which have been shown to you by the evidence. The reason for this rule is that we know that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into and in a sense are a part of the conduct in question. An act that is negligent, I repeat under one set of circumstances might not be so under another.

605 Therefore, to arrive at a fair standard, we ask what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances.

Our answer to that question gives us a criterion by which to determine whether the evidence before us proves negligence.

I have used the expression "proximate cause". I suppose that that again calls for a definition. What is the proximate cause of an injury?

The proximate cause of an injury is that cause which in actual and continuous sequence, unbroken by any efficient intervening cause, produces the injuries and without which the results would not have occurred. The proximate cause is the sufficient cause; the one that necessarily sets in operation the factors that cause the injuries. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury consisting of one factor or one act or one element or circumstances, or the conduct of only one person. On the contrary, the acts or omissions of two or more persons may work concurrently as the efficient cause of an injury and in such case each of the participating acts or omissions is regarded in law as the proximate cause.

606 When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly conducted conduct, contributes proximately each of such persons is responsible. This is true regardless of the relative degrees of the contribution.

However, in the law, we recognize what is termed an unavoidable or an inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided; they simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still none may be held liable for injuries resulting from it.

Now then, both negligence and proximate cause as I have defined them to you are requisities for finding liability. The mere fact that an accident happened considered alone does not support any inference that any party to the accident was negligent. No presumption of negligence whatsoever arises from the mere happening of the accident. On the contrary, the legal presumption is that legal care was exercised by all of the defendants.

607 The burden of proof is upon these plaintiffs to overcome this presumption of due care on the part of the defendants and to prove by a

preponderance of the evidence that the defendants were guilty of negligence and that such negligence was the proximate cause of the injuries.

You are instructed that you may not guess or speculate as to the existence of any facts in this case. You must base your findings solely upon the evidence that has been adduced before you and upon any inferences reasonably deductible therefrom.

You are instructed that at the time of the accident in question, the defendant Mr. Scott and the taxicab company were common carriers operating a vehicle on which the plaintiffs were passengers for hire. As a common carrier, the defendant Regal Cab and Mr. Scott were required by law to use all the care and skill and foresight within reason for the safe carriage of the plaintiffs as passengers. This high standard which the law places upon a common carrier does not make a common carrier an insurer of the passengers' safety but it does require the common carrier to exercise extraordinary care for the protection of its passengers.

608 You are instructed that if there is something in the appearance and conduct of a passenger which reasonably should put the driver on notice of some physical disability of the passenger which reasonably requires an extra degree of care for his safety, then the driver should do whatever reasonable care requires in view of the passenger's confronting. It will be presumed that the driver saw what he reasonably should have seen. On the other hand, the driver is not required to examine all the passengers as they enter his cab to see if any of them has any infirmities. In the absence of notice, the passenger is not entitled to any extra care not reasonably required for normal passengers.

You are instructed that the rights and obligations of the operator of one vehicle and that of the driver of another vehicle both using a public street are reciprocal. Each owes the other the exercise of ordinary care in an effort to avoid an accident.

We reach now an aspect of this case which may require some refinement of definition because the case involves a rear end collision.

The law is that as between the drivers of two vehicles proceeding

in the same direction, the driver of the following vehicle generally has the primary duty to take steps to avoid colliding. This is a general statement of the law upon this subject.

609 You are instructed further, however, that all drivers of vehicles using the highways are held to the exercise of due care. A leading vehicle has no absolute legal position superior to that of one following. Each driver must exercise ordinary care in a situation in which he finds himself. The driver of the leading vehicle must exercise ordinary care not to stop or slow up or swerve from his course without adequate warning to following vehicles of his intention to do so. The driver of of the following vehicle, in his turn, must exercise ordinary care to avoid collision with vehicles, both those in front and those behind him.

Just how close to a vehicle in the lead a following vehicle should in the exercise of ordinary care be driven, just what provisions a driver of such vehicle must in the exercise of ordinary care take to avoid colliding with the leading vehicle which slows up or stops or swerves in front of him, just what signals or warnings the driver of the leading vehicle must in the exercise of due care give before stopping, slowing or his intention to do so may not be laid down in any hard and fast or general rule. In each case, except when reasonable minds may not differ, what due care was required and whether it was exercised is a question of fact to be decided by the jury.

The Court in the course of this trial has admitted in evidence a number of traffic regulations. They were read to you by the attorneys.

610 I won't take your time to read them. I must point out to you, however, that a violation of any traffic regulation constitutes negligence as a matter of law if such violation is a proximate cause of the accident. If you find that the regulations were violated, these violations constitute negligence as a matter of law. This negligence or violation of the law has, however, no significance unless you find further that it was a proximate cause of the injuries to these plaintiffs.

We come now to another principle of evaluation of human conduct

which you must consider in determining the ultimate verdict in this case: A person who, without negligence on his own part, is suddenly confronted with an unexpected and imminent danger or circumstance which creates a reasonable apprehension of imminent danger either to himself or others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty then is to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger under the same circumstances. If at the moment of confrontation, he does what appears to him to be the best thing to do and if his choice and manner of actions are the same as might have been followed

611 by any ordinarily prudent person under the same conditions, he does all that the law requires of him although in the light of after events, it should appear that a different course would have been better and safer.

Further upon this same point, if you find that the drivers of either or both of these automobiles, without negligence on their part were confronted with circumstances which would create reasonable apprehension of imminent danger either to themselves or to others, you are instructed that they were not then expected or required to use the same judgment and prudence that would be required of them in calmer and more deliberate moments; their duty was to exercise only the care that an ordinarily prudent person would exercise if confronted with the same situation.

They are not negligent if their choice and manner of action were the same as might have been followed by an ordinarily prudent person under the same conditions even if it should turn out that a different course would have been better and safer.

In determining, however, whether a person's act or failure to act constitutes negligence, you may take into consideration the claims of the defendants that they were confronted with an emergency. But in order to

612 serve as a legal excuse for not taking the precautions ~~that~~ ordinarily required, the following facts must exist with respect to an emergency that diverts attention:

First, the emergency must involve imminent danger or circum-

stances which create a reasonable apprehension of imminent danger. Second, this situation must not be a proximate result of any negligence on the defendants' part. Third, it must act independently of any negligence on a defendant's part in preventing him from taking the precautionary measures in question. And fourth, the emergency must be such as would divert the attention of a person of reasonable fortitude and self-possession.

In connection with this doctrine of sudden emergency, you are instructed that where the operator of a motor vehicle himself creates the emergency or brings about the perilous situation through his own negligence, he cannot avoid liability on the ground that his acts were done in an emergency.

If under the Court's instructions to you, you find that these plaintiffs or any one of them are entitled to recover damages in this case, you will consider in determining the amount of those damages the items which I am now to enumerate to you:

* * * * *

617 I have observed in the course of this charge to you that I have stated various principles of the law or various ideas in varying ways. I must point out to you that any repetition is not intended to place any emphasis on any single point of law. For that reason, you should not single out any certain sentence or any individual point or instruction and ignore the others, but you should consider all the instructions as a whole and regard each of my statements to you in the light of all of the other statements.

* * * * *

620 Ask yourselves collectively a series of questions. The first question should be, I think; were the defendants or either of them negligent? Were they negligent? If the answer is no as to both sets of defendants, then you find for the defendants and there is nothing more to consider. If your answer is yes to one or both of the defendants or groups of defendants, you then proceed to the question of proximate cause.

Was the negligence which you have then found the proximate cause of the injuries to these plaintiffs? If your answer is no, you find for the

defendants or whichever ones you find were not the proximate cause of the injury. If your answer is yes the negligence of the defendant or defendants was the proximate cause of injury to the plaintiff or plaintiffs, you then must consider this doctrine of sudden emergency which I have defined in substantial detail to you.

If you find that the doctrine of sudden emergency is applicable to the defendants' conduct, then you at that point find for the defendant or defendants to whom you apply that standard of conduct. However, if you find that the doctrine of sudden emergency was not applicable, you proceed to the question of damages for each plaintiff in whose favor you find.

* * * * *

622

(AT THE BENCH)

THE COURT: The Court will assume for the record that all counsel renew all objections previously expressed to any formal prayers or oral prayers requested and submitted; that all objections with reference to the entire set of prayers are renewed.

Do the plaintiffs request any further charge?

MR. SHORTER: No, Your Honor.

THE COURT: Do you have any other objection to the charge as given?

MR. SHORTER: The only thing, Your Honor, right there at the end where you suggested an approach to issues of the case, you first said you should determine whether or not there was any negligence, then you said whether or not the sudden emergency applies. I think they should approach the question on this basis: whether or not this accident was caused by the negligence of any of the defendants, having in mind what you had instructed on negligence, or whether it was caused by a sudden emergency.

If they find them negligent, then they cannot determine whether there was a sudden emergency because that would preclude the happening of a sudden emergency.

THE COURT: Your objection is a matter of record.

* * * * *

[Filed November 16, 1961]

ORDER

Upon consideration of the oral motion made in open Court by the defendants to amend the pre-trial order to include the defense of unavoidable accident as provided for by Rule 15(b) of the Federal Rules of Civil Procedure and after argument by counsel for all the parties, it is this 16th day of November, 1961

ORDERED, that said motion be and it is hereby granted and the pre-trial order is hereby so amended to include the additional defense of unaveidable-accident Sudden Emergency. [initialled E.A.T.]

/s/ Edward A. Tamm
Judge

[Filed November 17, 1961]

DEFENDANTS' BROWNELL INSTRUCTION NO. 8

A person who, without negligence on his own part, is suddenly confronted with unexpected and imminent danger or circumstances which create a reasonable apprehension of imminent danger, either to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger, under the same circumstances. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer.

D.C. Standard Jury Instruction No. 47, 1959 Edition.

[Granted]

[Filed November 17, 1961]

VERDICT AND JUDGMENT

[Della Blackwell]

This cause having come on for hearing on the 13th day of November 1961, before the Court and a jury of good and lawful persons of this district, to wit:

* * *

* * *

who after having been duly sworn to well and truly try the issues between Della Blackwell, plaintiff, and Frank E. Brownell, Mildred Lane Brownell, Charlie C. Scott and Regal Cab Company, a corporation, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 17th day of November, 1961, that they find for the defendants against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk,

By direction of
Judge Edward A. Tamm

By /s/ Anne W. Lyddane
Deputy Clerk

[Filed November 17, 1961]

VERDICT AND JUDGMENT

[Yurrissan Carter]

This cause having come on for hearing on the 13th day of November, 1961, before the Court and a jury of good and lawful persons of this district, to wit:

* * *

* * *

who, after having been duly sworn to well and truly try the issues between Yurrissan Carter, a minor by her grandmother, and next friend Della Blackwell, plaintiff and Frank E. Brownell, Mildred Lane

Brownell, Charlie C. Scott, and Regal Cab Company, a corporation, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 17th day of November, 1961, that they find for the defendants against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk,

By direction of
Judge Edward A. Tamm

By /s/ Anne W. Lyddane
Deputy Clerk

[Filed November 17, 1961]

VERDICT AND JUDGMENT

[Raoul D. Carter]

This cause having come on for hearing on the 13th day of November, 1961, before the Court and a jury of good and lawful persons of this district, to wit:

* * *

* * *

who, after having been duly sworn to well and truly try the issues between Raoul D. Carter, a minor by his grandmother and next friend, Della Blackwell, plaintiff and Frank E. Brownell, Mildred Lane Brownell, Charlie C. Scott and Regal Cab Company, a corporation, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 17th day of November, 1961, that they find for the defendants against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk

By direction of
Judge Edward A. Tamm

By /s/ Anne W. Lyddane
Deputy Clerk

[Filed December 13, 1961]

NOTICE OF APPEAL

[Della Blackwell]

Notice is hereby given this 13th day of December, 1961, that DELLA BLACKWELL hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of November, 1961 in favor of Defendants against said Della Blackwell, plaintiff.

/s/ Curtis P. Mitchell
Attorney for Plaintiff

[Certificate of Mailing]

[Filed December 13, 1961]

NOTICE OF APPEAL

[Yurrissan Carter]

Notice is hereby given this 13th day of December, 1961, that Yurrissan Carter hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of November, 1961 in favor of Defendants against said Plaintiff.

/s/ Curtis P. Mitchell
Attorney for Plaintiff

[Certificate of Mailing]

[Filed December 13, 1961]

NOTICE OF APPEAL

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[Raoul D. Carter]

Notice is hereby given this 13th day of November, 1961, that Raoul D. Carter hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of November, 1961 in favor of Defendants against said Plaintiff.

[Certificate of Mailing]

/s/ Curtis P. Mitchell
Attorney for Plaintiff

